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In The

Supreme Court of the United States

PACESETTER APPAREL, INC.,

Petitioner,

v.

COBB COUNTY, GEORGIA, PATRICK H. HEAD, Individually and in his official capacity as District Attorney for Cobb County, Georgia, and ANDREW JASON SALIBA, Individually and in his official capacity as Assistant District Attorney for Cobb County, Georgia,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When a postdeprivation state remedy is the only recourse available, whether the effect of state-granted sovereign immunity enjoyed by a government official renders that postdeprivation remedy inadequate and meaningless under the *Parratt-Hudson* doctrine, thus resolving a doctrinal split amongst the Circuit Courts.

2. In a case where the actions of government actors were not random, unauthorized or intentional, and a predeprivation hearing would have been a practical and adequate remedy, whether the Eleventh Circuit Court of Appeals erred in judgment by misapplying the postdeprivation standard of the *Parratt-Hudson* doctrine.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	3
A. Factual Background	3
B. Procedural History	6
REASONS FOR GRANTING THE WRIT	8
I. THE CIRCUITS ARE SPLIT REGARDING THE MEANING OF ADEQUATE POSTDEPRIVATION REMEDY UNDER THE *PARRATT-HUDSON* DOCTRINE	10
A. *Parratt v. Taylor* and Its Progeny	10
B. Interpreting the Meaning of "Adequate Postdeprivation Remedy"	12
1. The Supreme Court's Interpretation of the Issue	13
2. The Circuit Courts' Interpretation of the Issue	16
a. The Eleventh Circuit's Analysis on the Adequacy of a Postdeprivation Remedy that is Defeated by State Immunity Law	16

TABLE OF CONTENTS – Continued

Page

b. The Supreme Court case of *Martinez v. California* 17

c. The Eleventh Circuit's Analysis of *Martinez v. California* 19

d. Inconsistent Application of the Adequacy of a Postdeprivation Remedy Among the Circuits 24

C. Why Guidance is Necessary 28

II. THE ELEVENTH CIRCUIT ERRED IN JUDGMENT BY MISAPPLYING THE POSTDEPRIVATION STANDARD OF THE *PARRATT-HUDSON* DOCTRINE 31

A. The *Zinermon* Predeprivation Feasibility Test 31

B. A Predeprivation Hearing Was Feasible 32

C. The Deprivation Was Predictable 33

D. Predeprivation Process Was Possible ... 34

E. The Deprivation Was Not Unauthorized .. 36

F. *Mathews v. Eldridge* Demands a Predeprivation Hearing 37

CONCLUSION 39

TABLE OF CONTENTS – Continued

Page

TABLE OF APPENDICES

Appendix A – Opinion of the United States Court of Appeals for the 11th Circuit Dated and Filed April 1, 2010 *Pacesetter Apparel Inc. v. Cobb County, Georgia, et al.*, No. 09-12402, 2010 WL 1239540 (11th Cir. Apr. 1, 2010) ..... App. 1

Appendix B – Opinion and Order of the United States District Court for the Northern District of Georgia Dated and Filed April 8, 2009 ..... App. 7

Appendix C – *Nunc Pro Tunc* Order of Superior Court of Cobb County ..... App. 20

Appendix D – Official Code of Georgia Annotated, Title 10, Chapter 1, Article 16, § 10-1-454 ..... App. 23

Appendix E – Official Code of Georgia Annotated, Title 16, Chapter 13, Article 2, § 16-13-49 ..... App. 25

Appendix F – Official Code of Georgia Annotated, Title 50, Chapter 21, Article 2 ..... App. 29

Appendix G – Excerpts from the Brief for Appellant Pacesetter Apparel, Inc., in *Pacesetter Apparel, Inc. v. Cobb County, Georgia, et al.* ..... App. 34

TABLE OF AUTHORITIES

Page

CASES

Belcher v. Norton, 497 F.3d 742 (7th Cir. 2007)....24, 25

Boddie v. Connecticut, 401 U.S. 379 (1971).....24

Bonner v. Coughlin, 517 F.2d 1311 (7th Cir. 1975).....9

City of Covina v. Perkins, 525 U.S. 234 (1999).....31

Daniels v. Williams, 474 U.S. 327 (1986).....7, 15, 23

Daniels v. Williams, 748 F.2d 229 (4th Cir. 1984).....26

Davidson v. Cannon, 474 U.S. 344 (1986).....15

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983).....7

Elder v. Holland, 208 Va. 15 (1967).....14

Engblom v. Carey, 677 F.2d 957 (2d Cir. 1982).....30

Herwins v. City of Revere, 163 F.3d 15 (1st Cir. 1998).....26

Hudson v. Palmer, 468 U.S. 517 (1984).....*passim*

Huron Valley Hospital, Inc. v. City of Pontiac, 887 F.2d 710 (6th Cir. 1989).....27

Lathon v. City of St. Louis, 242 F.3d 841 (8th Cir. 2001).....28

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982).....31

Martinez v. California, 444 U.S. 277 (1980).....17, 18, 19, 20

Mathews v. Eldridge, 424 U.S. 319 (1976).....37

TABLE OF AUTHORITIES – Continued

Page

McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994) 8, 12

Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978) 31

Monroe v. Pape, 365 U.S. 167 (1961) 10, 11, 13

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 24, 31

Parratt v. Taylor, 451 U.S. 541 (1981) ....*passim*

Powell v. Georgia Dept. of Human Res., 114 F.3d 1074 (11th Cir. 1997) 8, 17, 23

Putman v. Smith, 98 F.3d 1093 (8th Cir. 1996) 11

Rittenhouse v. DeKalb County, 764 F.2d 1451 (11th Cir. 1985) ....*passim*

Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) 6, 7

Roy v. City of Augusta, Maine, 712 F.2d 1517 (1st Cir. 1983) 25, 26

Rutherford v. United States, 702 F.2d 580 (5th Cir. 1983) 30

Tennessee v. Lane, 541 U.S. 509 (2004) 23

Thibodeaux v. Bordelon, 740 F.2d 329 (5th Cir. 1984) 16, 27

Vicory v. Walton, 721 F.2d 1062 (6th Cir. 1983) 27

Williams v. St. Louis County, 812 F.2d 1079 (8th Cir. 1987) 27

Zinermon v. Burch, 494 U.S. 113 (1990) ....*passim*

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. Amend. XIV 1, 9, 25, 28

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2101(c) 1

Civil Rights Act of 1871, 42 U.S.C. § 1983 .....*passim*

Supreme Court Rule 20 1

O.C.G.A. § 10-1-454 .....2, 35

O.C.G.A. § 16-13-49 .....2, 35, 36

O.C.G.A. § 50-21-25(a) 26

O.C.G.A. § 51-10-1 .....2, 8, 12

Federal Rule of Civil Procedure 12(b)(6) 6

OTHER AUTHORITIES

Kevin G. Chapman, *Parratt v. Taylor Revisited: Defining the Adequacy Remedy Requirement*, 65 B.U.L. Rev. 607 (1985) 29, 30

Black's Law Dictionary (Abridged 6th ed. 1991)....20, 21

OPINIONS BELOW

The orders and judgment of the United States District Court for the Northern District of Georgia (per Ward, J.) granting Respondent's summary judgment motion are reprinted at App. 7-19 and is not otherwise published. The Eleventh Circuit's decision (*per curium*) affirming the district court's decision is reprinted at App. 1-6 and is not otherwise published.

JURISDICTION

The Eleventh Circuit rendered its decision on April 1, 2010. This petition has been filed and docketed within the period established by Supreme Court Rule 20 and 28 U.S.C. § 2101(c). Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

Title 42, § 1983 of the United States Code provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress,. . . .

Title 10, Chapter 1, Article 16, § 10-1-454 of the Official Code of Georgia Annotated, codifying the definitions, penalties, and procedures regarding forged or counterfeited trademarks, service marks, or copyrighted or registered designs, pertinent parts of which are reprinted at App. 23-24.

Title 16, Chapter 13, Article 2, § 16-13-49 of the Official Code of Georgia Annotated, codifying the required procedures regarding criminal forfeitures, pertinent parts of which are reprinted at App. 25-28.

Title 51, Chapter 10, § 51-10-1 of the Official Code of Georgia Annotated, codifying the right of action for tortious deprivation of possession of personalty (conversion), which provides in full:

> The owner of personalty is entitled to its possession. Any deprivation of such possession is a tort for which an action lies.

Title 50, Chapter 21, Article 2 *et seq.* of the Official Code of Georgia Annotated, codifying waiver

of sovereign immunity as to state tort claims, pertinent parts of which are reprinted at App. 29-33.

STATEMENT OF THE CASE

A. Factual Background

On November 2, 2001, Pacesetter Apparel, Inc. (hereinafter, "Pacesetter Apparel"), a wholesale apparel business, sold its assets to Pacesetter Apparel Group, Inc. (hereinafter, "PAG"), owned and operated by Vance Bibb, executing a promissory note for $450,000.00.[1] On the same day, a security agreement was executed by PAG granting Pacesetter Apparel a security interest in all of PAG's then existing or thereafter acquired inventory. Pacesetter Apparel perfected its security interest in PAG's inventory by filing a financing statement with the Clerk of Superior Court of Cobb County, Georgia, on December 19, 2001.

After a year and a half, on July 15, 2003, the Magistrate Court of Cobb County, Georgia issued an "Order for Search and Seizure" authorizing the Cobb County District Attorney's Office to seize the inventory of PAG. The approximate wholesale value of the seized merchandise was $560,000.00. Cobb County police executed the Order on or about July 22,

[1] The factual background of this case is largely copied from Pacesetter Apparel's Brief submitted to the Eleventh Circuit Court of Appeals, reprinted in pages App. 34-56.

2003, seizing 21,400 articles of clothing inventory (hereinafter "inventory" or "seized property") from Vance Bibb and PAG. The Cobb County District Attorney's Office alleged that the seized inventory was counterfeit in nature.

On or about January 29, 2004, Pacesetter Apparel filed a civil lawsuit against PAG because PAG defaulted on its obligation to Pacesetter Apparel. Pacesetter Apparel attempted to obtain a judgment for the balance left under the promissory note, as well as the interest, late charges, and attorney's fees. Similarly, on April 2, 2004, Pacesetter Apparel filed a personal property foreclosure action seeking to foreclose its perfected security interest in all personal property subject to the perfected security agreement. The State Court of Gwinnett County, Georgia, granted Pacesetter Apparel a writ of possession and turnover order for said property in a foreclosure action conducted on May 18, 2004.

On May 20, 2004, Pacesetter Apparel participated in a telephone conversation with Respondent and Assistant District Attorney for the Cobb Judicial Circuit, Jason Saliba, to discuss the seized property. At that time, Pacesetter Apparel informed Saliba its perfected security interest in the seized property. Furthermore, Saliba stated that it was his suspicion

that Vance Bibb had "seeded"[2] the legitimate clothing with counterfeit clothing. Despite this suspicion, the Respondents did not inspect the seized property to confirm or deny the suspicion prior to the destruction of the seized property. Respondent Saliba, acting on behalf of the District Attorney's Office and Cobb County, was again informed on August 2, 2004, of Pacesetter Apparel's security interest in the seized property.

On May 27, 2005, Respondents transferred the seized property to the Cobb County Waste Transfer Station where it was destroyed unbeknownst to Pacesetter Apparel, despite actual knowledge of Pacesetter Apparel's security interest in the seized property. Respondents provided no notice to Pacesetter Apparel of their intent to destroy the inventory and granted no opportunity for Pacesetter Apparel to be heard regarding its interest in the seized property. In fact, Pacesetter Apparel did not learn about the destruction of the inventory until six months later when the Cobb County District Attorney's Office finally informed Pacesetter Apparel that the seized property had been destroyed. Specifically, Pacesetter Apparel was denied a forfeiture hearing.

In December 2006, over one and a half years after the destruction of the inventory, Vance Bibb, as

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[2] "Seeding" refers to the process by which a counterfeiter will scatter counterfeit clothing amongst legitimate clothing in order to mask the false clothing's presence.

President of PAG, was indicted on a charge of forged or counterfeit trademarks. On January 25, 2007, Bibb pled guilty to the charge in a hearing where Pacesetter Apparel was denied standing to voice its concerns and defenses regarding the seized and subsequently destroyed property. Instead, without granting Pacesetter Apparel the opportunity to be heard, the Superior Court of Cobb County, at Respondents' request, issued a *nunc pro tunc* order stating: 1) all items previously seized and destroyed were counterfeit, and therefore contraband; 2) all contraband should be destroyed; and 3) samples of each item should be kept.

B. Procedural History

Petitioner, on or about June 2007, filed a complaint under 42 U.S.C. § 1983 against Respondents Cobb County, Saliba, and Head, alleging that his property had been seized and destroyed by Respondents without due process of law.

In an order dated April 8, 2009, the United States District Court of North Georgia granted Respondents' (then Defendants) motion to dismiss citing Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief could be granted. App. 19. The district court supported its conclusion, citing the *Rooker-Feldman* doctrine,[3]

[3] The *Rooker-Feldman* doctrine is a rule of civil procedure enunciated by the Supreme Court in two cases, *Rooker v.*

(Continued on following page)

which denies the district court jurisdiction over state claims that have already been decided by a state court. App. 11-12. Additionally, the district court cited *Hudson v. Palmer*, 468 U.S. 517 (1984), holding that no due process violation had occurred because adequate postdeprivation remedies exist under Georgia State law. App. 11-15. Furthermore, the district court concluded that each of the Defendant-Respondents were entitled to judgment in their favor and dismissed Pacesetter Apparel's claim against each Defendant. *Id.*

On appeal, the Eleventh Circuit upheld the ruling of the district court in a *per curiam* opinion. App. 6. The Eleventh Circuit recognized Pacesetter Apparel's perfected security interest in the seized property and that Respondent Saliba was properly notified of Pacesetter Apparel's property interest before the destruction. App. 2. However, the Court of Appeals upheld the district court's decision to dismiss the case. App. 6.

The Eleventh Circuit ruled that a predeprivation hearing was not necessary under *Parratt v. Taylor*, 451 U.S. 541 (1981) (overruled for other reasons, *Daniels v. Williams*, 474 U.S. 327 (1986)), and *Hudson v. Palmer*. App. 4. Specifically, when the

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Fidelity Trust Co., 263 U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). The doctrine holds that lower federal courts should not sit in direct review of state court decisions unless Congress has specifically authorized such relief.

deprivation of property is random and unauthorized, "[a]ll that due process requires is a postdeprivation 'means of redress for property deprivations satisfy[ing] the requirements of procedural due process.'" App. 5 (quoting *McKinney v. Pate*, 20 F.3d 1550, 1563 (11th Cir. 1994), and *Parratt*, 451 U.S. at 537).

The Eleventh Circuit ruled that there is an adequate postdeprivation remedy under Georgia law, specifically an action for conversion of property under O.C.G.A. § 51-10-1. App. 5. Pacesetter argued that this remedy was inadequate because the Respondent-Appellants enjoy official immunity, rendering any attempt to pursue a conversion action futile. *Id.* However, the Eleventh Circuit ruled that precedent foreclosed this argument. *Id.* According to the Eleventh Circuit, immunity enjoyed by a state actor or county does not render a state postdeprivation remedy inadequate under the *Parratt-Hudson* doctrine. *Id.* (citing to *Powell v. Georgia Dept. of Human Res.*, 114 F.3d 1074 (11th Cir. 1997) and *Rittenhouse v. DeKalb County*, 764 F.2d 1451 (11th Cir. 1985)).

REASONS FOR GRANTING THE WRIT

The petition should be granted for two reasons. *First*, the Eleventh Circuit has committed reversible error by misapplying the "adequate state remedy" standard established in *Parratt v. Taylor* and its progeny, *Hudson v. Palmer*. Using the controlling opinion of then Judge Stevens of the Seventh Circuit, this Court held that dismissal of a § 1983 is proper

subject to the availability of "an adequate state remedy to redress property damage by state officers." *Parratt*, 451 U.S. at 541-42 (quoting *Bonner v. Coughlin*, 517 F.2d 1311, 1319 (7th Cir. 1975)). Thus, the availability of an adequate postdeprivation state remedy is enough to satisfy the procedural due process requirement of the Fourteenth Amendment. Although the plain language test set forth in *Parratt* compels an "adequate state remedy," the Eleventh Circuit clings to precedent, holding that a defendant's sovereign immunity does not bar an adequate and meaningful opportunity to be heard. This is in stark contrast to the approach of the Seventh and First Circuits, in which those courts found that sovereign immunity *does* prevent a plaintiff from receiving an adequate postdeprivation remedy when the state law immunity bars the plaintiff's only avenue of recovery. This case presents the Court with a much-needed opportunity to resolve a sharp conflict among federal courts over whether a defendant's immunity from liability still allows a plaintiff to receive an adequate postdeprivation hearing as required by *Parratt* and *Hudson*.

Second, the Eleventh Circuit court has dramatically strayed from the established principles of due process by affirming the sufficiency of a postdeprivation hearing when a predeprivation hearing was required, as articulated in *Zinermon v. Burch*. *Zinermon v. Burch*, 494 U.S. 113 (1990). *Zinermon* establishes a three-part test to determine the feasibility of a predeprivation hearing when a government

actor sets out to deprive a person of their life, liberty, or property. This Court held that (1) a predeprivation hearing is inappropriate when the deprivation is unpredictable, (2) a predeprivation process would be impossible, and (3) the conduct of the government officials is "unauthorized." *Id.* at 136-39. While in possession of the deprived property, the District Attorney's Office of Cobb County failed to provide any predeprivation hearing prior to the destruction of Pacesetter Apparel's confiscated property. In this case, a predeprivation hearing regarding the destruction of the property, which is an authorized function of the District Attorney's Office, would have been both predicable and possible. Therefore, because the District Attorney's Office should have afforded the Pacesetter Apparel a predeprivation hearing, this case cries out for this Court's review.

I. THE CIRCUITS ARE SPLIT REGARDING THE MEANING AN ADEQUATE POST-DEPRIVATION REMEDY UNDER THE *PARRATT-HUDSON* DOCTRINE

A. *Parratt v. Taylor* and Its Progeny

The Civil Rights Act of 1871, codified as Title 42, § 1983 (hereinafter "§ 1983") of the United States Code, was not given the strength of its intended force until ninety years later in the landmark case of *Monroe v. Pape*, 365 U.S. 167 (1961). In *Monroe*, § 1983 gained new teeth to ensure that citizens finally had the necessary recourse to protect their rights under the Fourteenth Amendment from the

unconstitutional conduct of state actors. *Id.* at 174. However, many feared that this decision would open the floodgates for a tidal wave of new federal tort litigation and choke the judiciary with scores of frivolous claims.

In response to these ongoing and vocal concerns, the Court in *Parratt v. Taylor* limited the reach of *Monroe*, holding that certain deprivations of due process rights are not constitutional injuries if the state provides the necessary and adequate due process following a deprivation. *Parratt*, 451 U.S. at 544. Now, the *Parratt-Hudson* doctrine (incorporating one of *Parratt*'s progeny, *Hudson v. Palmer*) provides the framework by which a state actor's random and unauthorized or intentional deprivation of a plaintiff's property does not violate procedural due process rights if the state provides an *adequate* postdeprivation remedy. *See Putman v. Smith*, 98 F.3d 1093, 1095 n.4 (8th Cir. 1996).

While the Court has toiled to bring sense and clarity to § 1983 and procedural due process, one notable topic has remained largely unclear to the lower courts. The circuit courts are wholly conflicted on whether a state actor's immunity from liability renders a postdeprivation state remedy meaningless, unsuitable, and inadequate, insofar as it would not satisfy procedural due process for a § 1983 claim falling under the control of *Parratt* and *Hudson*.

B. Interpreting the Meaning of "Adequate Postdeprivation Remedy"

Pacesetter Apparel, Inc. prays to this Court to review how the Eleventh Circuit Court of Appeals has interpreted and applied the concept of an "adequate postdeprivation remedy." In the instant case, the Eleventh Circuit relied on precedent in its ruling, stating, "all due process requires is a postdeprivation means of redress for property deprivations satisfying the requirements of procedural due process." App. 5 (quoting *McKinney*, 20 F.3d at 1563). The court further explained that Georgia provides an adequate postdeprivation remedy for a wrongful deprivation of property in the cause of action for conversion of property, even when the claim is the plaintiff's only avenue for recovery and is defeated by state law immunity. *Id.*; *see also* Official Code of Georgia Annotated § 51-10-1, *ante* Constitutional and Statutory Provisions Involved.

However, Pacesetter Apparel argued to the court that suing the District Attorney's Office of Cobb County for conversion was not an adequate postdeprivation remedy because the District Attorney's Office and its officers enjoyed immunity from liability for all tort claims committed in the course of their official duties. App. 49-51. The Court of Appeals acknowledged this argument, but dismissed it wholly without analysis, relying entirely on Eleventh Circuit precedent. App. 5. Without analyzing whether the remedy available to Pacesetter Apparel was adequate, meaningful, or suitable, the Eleventh Circuit has failed to

abide by this Court's guidance in *Parratt* and *Hudson*.

1. The Supreme Court's Interpretation of the Issue

With this case, this Court would be able to address what precisely constitutes an "adequate postdeprivation remedy" as an issue of first impression. Furthermore, it would serve as an opportunity to settle inconsistent federal judicial decisions on the issue of sovereign immunity's effect on a remedy's adequacy.

In *Monroe v. Pape*, the Court found that Congress had three principal aims in § 1983: (1) to override "invidious legislation" by the states, which impaired rights and privileges of citizens of the United States; (2) to provide a remedy for infringement of such rights and privileges where the state law was inadequate; and (3) to provide a federal remedy where a state remedy was adequate in theory, but not in actual practice. *Monroe*, 365 U.S. at 173-74.

Although *Parratt* and *Hudson* provide additional insight into what the "adequacy" standard entails, they are distinguishable from Pacesetter Apparel's circumstances. In *Parratt* and *Hudson*, an adequate postdeprivation state remedy was available to the respective plaintiffs. *See Parratt*, 451 U.S. at 543; *Hudson*, 468 U.S. at 535. For this reason, neither case provides a clear standard for an "adequate postdeprivation remedy." The circuit courts, therefore,

must rely on their own interpretation of "adequacy," creating the split that exists today.

In *Parratt*, the State of Nebraska provided a procedure through which the State would hear and pay prisoners for a tortious loss at the hands of the State. *Parratt*, 451 U.S. at 543. The Court remarked that although the Nebraska statute contained no provisions for suing state actors in their individual capacities, holding a trial by jury, or awarding punitive damages, the remedy was nonetheless adequate. *Id.* at 543-44. "Although the state remedies *may not provide the respondent with all the relief* which may have been available if he could have proceeded under § 1983, that does not mean that the state remedies are not adequate to satisfy the requirements of due process." *Id.* (emphasis added). The Court held that the statute could, in fact, fully compensate the respondent for his deprived property.[4] *Id.*

Similarly, in *Hudson*, under Virginia law, a state employee could be held liable for a tortious act. *Hudson*, 468 U.S. at 535 (quoting *Elder v. Holland*, 208 Va. 15, 19 (1967)). The Court found, as with *Parratt*, that the postdeprivation remedy provided by Virginia was adequate because the "respondent's claim would not be barred by sovereign immunity."

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[4] The inference within the emphasized portion of the quote is that for a postdeprivation state remedy to meet minimal adequacy to satisfy due process, there must be *some* or even *any* relief available to the claimant.

Hudson, 468 U.S. at 535-36; *see id.* at 520, n.1 (further elaborating on the claims available). It is also noteworthy that *Hudson*'s language expands the adequacy standard by describing a satisfactory remedy to additionally include "meaningful," *id.* at 532, 533, and "suitable," *id.* at 533. Therefore, for a postdeprivation state remedy to satisfy due process, that remedy must be adequate, meaningful, *and* suitable.

This issue was also raised before the Court in *Daniels*, 474 U.S. at 333, n.1, and *Davidson v. Cannon*, 474 U.S. 344, 360 (1986), but the Court found it unnecessary to resolve the question in both cases because the respective state laws did not fully insulate the state officials from tort liability, and thus afforded adequate remedies to the injured individuals. However, dissenting and concurring opinions expose the law's uncertainty and incongruity on the issue. Justice Blackmun, dissenting in *Davidson*, would have held that a New Jersey immunity statute rendered a state-law tort claim an inadequate remedy. *Id.* at 358 (Blackmun, J., joined by Marshall, J., dissenting). Furthermore, to Blackmun, such State-imposed immunity conflicts with § 1983, thereby violating the Supremacy Clause. *Id.* at 359. Justice Stevens, concurring in *Daniels* and *Davidson*, took the opposite position, concluding that such immunities do not render a remedy inadequate under *Parratt*. *See Daniels*, 474 U.S. at 343 (Stevens, J., concurring for both *Daniels* and *Davidson*).

2. The Circuit Courts' Interpretation of the Issue

The Circuit Courts of Appeals are divided on the issue of whether a postdeprivation state remedy adequately satisfies due process when the defendant enjoys immunity from liability. Indeed much of the confusion stems from the lack of clarity within *Parratt* and *Hudson* concerning the matter. The circuits themselves have sought guidance regarding the various facets of *Parratt* from the start. "Application of the *Parratt* decision by the federal district and circuit courts has hardly been a model of uniform judicial decisionmaking." *Thibodeaux v. Bordelon*, 740 F.2d 329, 335 (5th Cir. 1984).

a. The Eleventh Circuit's Analysis on the Adequacy of a Postdeprivation Remedy that is Defeated by State Immunity Law

This Court has held that a deprivation of due process has not occurred if the State provides an adequate postdeprivation remedy – a remedy that affords the plaintiff a meaningful opportunity to be heard – to redress an intentional or random and unauthorized act of a government official. *See Parratt* 451 U.S. at 544-45; *Hudson*, 468 U.S. at 536-37. In contrast, the Eleventh Circuit has held that a deprivation of due process has not occurred if the State provides the plaintiff an opportunity to adjudicate an issue as a postdeprivation remedy, even if state law immunity defeats that claim once the claim is

initiated by the plaintiff. *Rittenhouse*, 764 F.2d at 1458-59. A claim that is the plaintiff's only avenue of recovery, which is defeated at the onset by state immunity law, deprives the plaintiff of due process because the plaintiff is never afforded a meaningful opportunity to be heard.

Rittenhouse is the leading case in the Eleventh Circuit that has addressed the issue of what the *Parratt-Hudson* doctrine considers an adequate remedy. *See Powell*, 114 F.3d at 1082, n.11. In *Rittenhouse*, a driver involved in an automobile accident filed a § 1983 claim alleging that her due process rights were violated by the actions of the government and its officials. *Rittenhouse*, 764 F.2d at 1452-53. Sovereign immunity, by shielding the government and its officials from liability, ultimately defeated the plaintiff's § 1983 claim. *Id.* at 1453. The *Rittenhouse* court held that a claim, which is defeated by state immunity law, is an adequate remedy under *Parratt-Hudson* because "the Georgia immunity rules do not themselves deny procedural due process." *Id.* at 1458.

b. The Supreme Court case of *Martinez v. California*

The *Rittenhouse* court based its analysis on a Supreme Court case that occurred before the *Parratt* and *Hudson* cases. *Rittenhouse*, 764 F.2d at 1457-58. In *Martinez*, the estate of a murdered 15-year-old girl initiated a cause of action in the State of California alleging that the state officials were liable for the

injury caused by a parolee. *Martinez v. California*, 444 U.S. 277, 279 (1980). The state officials released the parolee from prison and five months later the parolee killed the victim. *Id.* The Supreme Court reviewed the case after the California Supreme Court denied a petition for a hearing. *Id.* at 280.

The two issues presented before the *Martinez* Court were (1) whether a state's immunity law violates due process, and (2) whether state officials are absolutely immune from a § 1983 claim. *Id.* at 279. The Court disposed of the second issue holding that the officials' actions were too remote to result in the deprivation of life, thus preventing the Court from even addressing the threshold question of whether the plaintiff was deprived of a constitutional right under a § 1983 claim. *Id.* at 284-85.

The *Rittenhouse* court, in its analysis, focused on the first issue presented to the Court in *Martinez*, whether a state's immunity law violates due process. *Rittenhouse*, 764 F.2d at 1458 n.9. In addressing the first issue, the *Martinez* Court held that California's immunity law did not deprive the victim of life without due process of law because the officials' decision to release the parolee was an indirect cause of the death and not sufficient to constitute a deprivation of life. *Martinez*, 444 U.S. at 281. In addressing the second issue, the Court held that the state law immunity did not deprive the victim of property. However, the wrongful death claim may be considered "a species of 'property' protected by the Due Process Clause." *Id.* at 282-83.

Even though the Court found that no deprivation occurred, it considered the possibility of a deprivation in the context of the *Martinez* case. *Id.* at 282. The Court held that "a State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational." *Id.* The Court held that the State of California has a rational interest in shielding state officials exercising discretion in order to foster a productive parole program. *Id.* at 283.

It is important to note that the issue of whether state immunity law is constitutional is different from the issue of whether state law immunity, which defeats a postdeprivation claim, provides adequate remedy under *Parratt* and *Hudson*. A plaintiff in an ordinary tort claim, like the plaintiff in *Martinez*, is in a different position than a plaintiff asserting a postdeprivation claim. Under the *Parratt-Hudson* doctrine, one of the first steps courts take is determining that a deprivation of life, liberty, or property has occurred. *Parratt*, 451 U.S. 536-37. Once this determination has been made, a plaintiff is owed an adequate remedy. For these reasons, *Parratt* and *Hudson* are distinguishable from *Martinez*.

c. The Eleventh Circuit's Analysis of *Martinez v. California*

The problem with the Eleventh Circuit's analysis in *Rittenhouse* is that it erroneously concluded the

plaintiffs in *Martinez* are similarly situated with a plaintiff who initiates a postdeprivation claim under *Parratt* and *Hudson*. The *Rittenhouse* court made an important acknowledgement: the Court in *Martinez* did not address the issue of whether a claim defeated by state immunity law is an adequate postdeprivation remedy primarily because the *Martinez* Court held that no deprivation of a protected Constitutional right occurred. *Rittenhouse*, 764 F.2d at 1458, n.9. However, the *Rittenhouse* court failed to acknowledge that a plaintiff in a case like *Martinez* is not similarly situated to a plaintiff in a postdeprivation claim because a postdeprivation claim requires *first*, a determination that a government official acted under color of state law, *second*, a determination that there has been a deprivation of a constitutional right, and *third*, an adequate remedy to address this deprivation. *Parratt*, 451 U.S. 536-37; *Hudson*, 468 U.S. at 537 (O'Connor, J., *concurring*) ("These cases decide only *what* is the appropriate source of the constitutional right and the remedy that corresponds with it").

The next issue that the *Rittenhouse* court glossed over is the meaning of the term "adequate remedy." According to Black's Law Dictionary, the definition of a "remedy" is "[t]he means by which a right is enforced or the violation of a right is prevented, redressed, or *compensated*." Black's Law Dictionary 896 (Abridged 6th ed. 1991). First, the effect of the state's immunity law is that it prevents the plaintiff from enforcing the previously deprived right since it

defeats a claim once the government or its officials asserts immunity. The second effect of a state's immunity law is that it never affords the plaintiff an opportunity to be heard so that the state could potentially redress a possible wrong. Thus, a claim defeated by state immunity law is not considered a remedy. Moreover, Black's Law Dictionary defines the term "adequate remedy at law" as "a remedy that affords complete relief with reference to the particular matter in controversy, and is appropriate to the circumstances of the case." *Id.* at 25. A plaintiff seeking an adequate postdeprivation remedy in the Eleventh Circuit, whose claim is defeated by the state immunity law, is never afforded a remedy, let alone an adequate remedy that provides sufficient relief to the petitioning party, because the state immunity law defeats the claim, which essentially deprives the plaintiff of his due process rights.

But of utmost importance is how the Supreme Court has addressed the term adequate remedy in a postdeprivation claim. In *Parratt*, the Court held that an adequate remedy for the deprivation of property requires a full and meaningful hearing. *See Parratt*, 451 U.S. at 540-41. The *Parratt* Court reviewed the remedy available to the prisoner to determine whether the State of Nebraska provided an adequate postdeprivation hearing for the destruction of the prisoner's property. *Id.* at 543-44. The Court held that the State of Nebraska had an adequate postdeprivation remedy because "[t]hrough [its] tort claims procedure the State hears and pays claims of

prisoners housed in the penal institution." *Id.* at 543. The Court acknowledged that the remedy available is not exactly what the petitioner sought in several respects. First, it allowed an action against the State instead of the government official. Second, it did not provide punitive damages. Third, there was no right to a trial by jury. Despite these shortcomings, the remedy nonetheless satisfied the adequate remedy requirement. *Id.* at 544. The Court held the State of Nebraska provided an adequate remedy for the deprivation of the prisoner's property because "the remedies provided could have fully compensated the respondent for the property loss he suffered . . . " therefore, " . . . they are sufficient to satisfy the requirements of due process." *Id.*

A postdeprivation claim that is defeated by state immunity law is a deprivation of due process when it is the sole avenue of recovery for the plaintiff. Moreover, it is not considered an adequate remedy because it lacks a full and meaningful hearing that provides some type of compensation. *See id.* at 540-41 (holding that an adequate remedy is a full and meaningful hearing); *see id.* at 551, n.9 (Powell, J., concurring opinion) ("If . . . immunity has the effect of cutting off all state-law remedies, under the Court's reasoning there appears to be a deprivation of procedural due process, actionable in federal court.") *See also Hudson*, 468 U.S. at 532, n.11 (addressing the fact that in *Parratt,* the prisoner received compensation, even though compensation was not all the relief the prisoner was entitled under § 1983). Here, Pacesetter

Apparel was denied its access to meaningful procedural due process because the Eleventh Circuit continued to rely on its holding in *Rittenhouse*. App. 5; *see also Powell*, 114 F.3d 1082, n.11 (considering a postdeprivation claim that is defeated by state law immunity an adequate remedy). As in this case, when a claim is defeated at its inception by state law immunity, the petitioner is afforded neither a hearing, nor compensation in the manner this Court contemplated in *Parratt* and *Hudson* because Georgia's law immunity denies the petitioner an opportunity to be heard, which consequently denies due process.

Although this Court has never addressed the issue of whether a state official's immunity defeats the only postdeprivation claim available to a plaintiff is considered an adequate remedy, the Court's previous holdings suggest that the effect of immunity does not meet this requirement. *See Hudson*, 468 U.S. at 535 (did not address claim of immunity because lower courts held that claim would not be barred by sovereign immunity); *Daniels*, 474 U.S. at 333, n.1 ("we need not decide whether, as petitioner contends, the possibility of a sovereign immunity defense in a Virginia tort suit would render that remedy 'inadequate' under *Parratt* and *Hudson*"); *Parratt*, 451 U.S. at 540-41 (holding that an adequate remedy is a full and meaningful hearing). *See also Tennessee v. Lane*, 541 U.S. 509, 523 (2004) (holding that the duty to accommodate is perfectly consistent with the well-established due process principle that, within the limits of practicability, a State must afford to all

individuals a meaningful opportunity to be heard in its courts); *Boddie v. Connecticut*, 401 U.S. 379, 379 (1971) ("a State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause") (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)). Pacesetter Apparel respectfully prays to this Court to hold that state immunity, when it defeats a plaintiff's only avenue of recovery and denies a meaningful opportunity to be heard, violates procedural due process.

d. Inconsistent Application of the Adequacy of a Postdeprivation Remedy Among the Circuits

While the Eleventh Circuit has weighed decidedly on this issue, the other circuits employ a wide spectrum of approaches. Consider the Seventh Circuit's approach in determining whether a plaintiff has an adequate postdeprivation remedy when the plaintiff's only avenue of recovery is defeated by sovereign immunity. In *Belcher v. Norton*, the plaintiffs attempted to retrieve items from their recently impounded vehicle located in a tow yard. *Belcher v. Norton*, 497 F.3d 742, 745 (7th Cir. 2007). The owner of the tow yard would not allow the plaintiffs to leave the premises with the items unless they paid the tow fee or signed the vehicle's title over to the towing company. *Id.* Shortly after, an officer arrived at the tow yard and threatened to arrest the plaintiffs if they did not comply with the owner's desires. *Id.* at

745-46. One of the plaintiffs signed the title over to the towing company. *Id.* at 746. Later, the plaintiffs filed a § 1983 claim against the officer and the Town of Orland alleging "that the defendants' actions had subjected them to an illegal seizure and had violated their procedural and substantive due process rights under the *Fourteenth Amendment*." *Id.*

In addressing the procedural due process claim, the Seventh Circuit provided the plaintiffs with a proper remedy when the district court granted the defendants' summary judgment based on immunity. *Id.* at 753. The Seventh Circuit held, since the state officials enjoyed immunity, the plaintiffs were not afforded an adequate remedy because the state law immunity "would deprive them of any meaningful avenue to seek redress for the deprivation that they claim to have suffered." *Id.* The outcome of this case in the Seventh Circuit directly conflicts with the Eleventh Circuit's analysis in *Rittenhouse*; the Seventh Circuit engaged in proper analysis by considering the effect state law immunity had on the plaintiff's only avenue to seek redress for the deprivation of a right. *See id.* at 753; *Rittenhouse*, 746 F.2d at 1458-59.

The First Circuit's position is in line with that of the Seventh Circuit's. In *Roy v. City of Augusta, Maine*, the Court of Appeals explains that immunity prevents practical redress, thereby preventing an adequate remedy. *Roy v. City of Augusta, Maine*, 712 F.2d 1517, 1524, nn.6-7 (1st Cir. 1983). "Because of the state's grant of absolute immunity to the

defendants, [the Appellant] appears unable to receive a damage remedy under state law." *Id.* at 1525, n.6. Additionally, in some states within the Circuit, immunity is rarely an issue with the adequacy standard. *See Herwins v. City of Revere*, 163 F.3d 15, 20 (1st Cir. 1998) (observing that under Massachusetts law, a state remedy would probably be adequate because public employees have no immunity from claims based on intentional torts).

In *Daniels v. Williams*, a Fourth Circuit case, this Court affirmed the holding in which the availability of a state action in tort was found to be an adequate postdeprivation remedy, despite the defendant claiming that he would assert immunity as a defense. *Daniels v. Williams*, 748 F.2d 229, 235 (4th Cir. 1984), (*affirmed*, *Daniels v. Williams*, 474 U.S. 327 (1986)). However, it is very important to note that the Court of Appeals came to this conclusion "believ[ing] that respondent's sovereign immunity defense would fail under Virginia law." *Id.* Unlike the petitioner Daniels, Pacesetter Apparel does not have such a remedy under Georgia law, which grants immunity to its state officials. *See* O.C.G.A. § 50-21-25(a), App. 32. Under similar circumstances, based on the language of *Daniels*, it is probable that the Fourth Circuit would not have reached the same conclusion.

Within the Fifth and Sixth Circuits, the courts evaluate the adequacy of the state's postdeprivation procedures to ensure due process satisfaction. The courts find that due process does not require full compensation or even the same compensation that

would ordinarily be available under a § 1983 action. *Thibodeaux*, 740 F.2d at 338 ("[Postdeprivation] procedures may be inadequate, but they may not be ignored."); *Huron Valley Hospital, Inc. v. City of Pontiac*, 887 F.2d 710, 715-16 (6th Cir. 1989) (concluding that injured plaintiffs had an adequate remedy if the state procedures afforded some relief, even if less relief than § 1983); *Vicory v. Walton*, 721 F.2d 1062, 1065 (6th Cir. 1983) (holding that § 1983 is not violated "so long as a state's damage remedies are not shown to be inadequate in theory or practice – that is, so long as there is no systemic problem with the state's corrective process"). The Fifth and Sixth Circuits hold, therefore, that a court must analyze a state's remedies to ensure that *some* relief would be available to an injured plaintiff. While *full* compensation may not be available, *some* relief is a far cry from *no* compensation, as applied under the Eleventh Circuit's model.

While the Eighth Circuit has not directly addressed the issue of sovereign immunity's effect on adequacy, it still holds a position that is more in line with the Seventh Circuit than is not. In *Williams v. St. Louis County*, the court decided it unnecessary to rule on the issue, finding that the remedy afforded to the appellant was far outside the standard of even the most expansive of adequacy standards. *Williams v. St. Louis County*, 812 F.2d 1079 (8th Cir. 1987). However, the court acknowledges the confusing state of the case law regarding this conflict, and reviews the various commentaries on the matter. *Id.* at 1082.

In *Lathon v. City of St. Louis*, the court found a postdeprivation remedy in replevin insufficient because the remedy required the plaintiff-appellant to initiate cases in four separate counties to be fully compensated. *Lathon v. City of St. Louis*, 242 F.3d 841 (8th Cir. 2001). Therefore, the court held that the remedy was inadequate because of its impracticality and unsuitability. *Id.* at 844. Based on *Lathon*, if faced with the issue of sovereign immunity barring meaningful access to a state remedy, the Eighth Circuit would likely find that remedy inadequate as well.

Other than the Eleventh Circuit, there is very little direct support for a standard that would find a postdeprivation state remedy as adequate when the state official is immune from tort liability. Therefore, by adhering to an adequacy standard so expansive and deferential to state interests so as to put the life, liberty, and property rights of individuals in peril, the Eleventh Circuit is out of accord with the rest of the federal judiciary, including the Supreme Court, in its application of the *Parratt-Hudson* doctrine.

C. Why Guidance is Necessary

Few rights are more carefully guarded by judicial review than the Fourteenth Amendment's guarantee that no state shall deprive a person of life, liberty, or property without due process of law. However, in its effort to maintain administrative efficiency, the Eleventh Circuit has inadvertently prevented

substantial justice by dispensing with cases involving real constitutional issues. Their method of disposal is to invoke the *Parratt-Hudson* doctrine, and claim that the plaintiff has no constitutional cause of action because a state remedy for their injury exists. Contrary to the intent of § 1983, however, a state remedy that renders a government official immune from liability, and therefore makes a case moot before the state court, is not an adequate postdeprivation remedy to satisfy procedural due process.

The extent of this abuse of judicial discretion has broad, unjust implications. It creates an impervious shield around government officials where they cannot be held accountable in any meaningful way for misconduct performed within the course of their official duties. In cases involving the *Parratt-Hudson* doctrine, the Eleventh Circuit has avoided any opportunity to analyze whether a state remedy actually satisfies the doctrine's "adequacy" requirement of a postdeprivation remedy. The Eleventh Circuit refers to Georgia's tort remedies as adequate, even though receiving such a remedy is foreclosed by Georgia's sovereign immunity statute.

Because there is not federal judicial uniformity as to what an adequate postdeprivation remedy entails, a clear test should be established by the Supreme Court to alleviate the confusion. Kevin G. Chapman, a legal scholar from Boston University, suggested that a "strict adequacy" standard would relieve the lower courts from misapplying the adequacy test set forth by *Parratt-Hudson*. Kevin G.

Chapman, *Parratt v. Taylor Revisited: Defining the Adequacy Remedy Requirement*, 65 B.U.L. Rev. 607 (1985). Strict adequacy, as a standard, would "demand[] analysis of the adequacy of the available process to remedy the essential aspects of the interests at stake." *Id.* at 632 (quoting *Rutherford v. United States*, 702 F.2d 580, 583 (5th Cir. 1983)); *see also Engblom v. Carey*, 677 F.2d 957, 965 (2d Cir. 1982) (in accord with *Rutherford*). Ideally, the plaintiff must make a minimal showing that a particular state remedy is inadequate; however, the burden of proof would shift to the defendant to show that remedy is, in fact, adequate enough to satisfy due process. Chapman, *supra* 636. Applying strict adequacy will fix the chilling effect of immunity to recovery. "Even under a minimal adequacy test, the provision for a hearing with no actual remedy provides little due process protection. . . . A common sense interpretation of the *Parratt* holding is that an actual recovery is necessary to provide an adequate remedy." *Id.* at 641.

The Eleventh Circuit's misapplication of the guidelines provided within *Parratt* and *Hudson* is in stark contrast to many of the other circuits, most notably the Seventh Circuit. This jurisdictional rift begs for the Supreme Court's clear guidance for the proper application of the "adequacy" requirement of *Parratt-Hudson*. Moreover, this guidance will also provide the necessary uniform federal standard that is essential to perfecting substantial justice under § 1983.

II. THE ELEVENTH CIRCUIT ERRED IN JUDGMENT BY MISAPPLYING THE POST-DEPRIVATION STANDARD OF THE *PARRATT-HUDSON* DOCTRINE

A. The *Zinermon* Predeprivation Feasibility Test

The Supreme Court has permitted postdeprivation process only when predeprivation process was not feasible because of impracticability, unauthorized conduct, or when predeprivation would be particularly burdensome. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982) (holding that "the necessity of quick action by the State or the impracticality of providing any predeprivation process may render a postdeprivation constitutionally adequate") (internal quotes removed); *see also Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 18-19 (1978) ("Where the potential length or severity of the deprivation does not indicate a likelihood of serious loss and where the procedures . . . are sufficiently reliable to minimize the risk of erroneous determination"). Furthermore, due process generally requires notice prior to the deprivation of a protected interest because prior notice "ensure[s] that the opportunity for a hearing is meaningful." *City of Covina v. Perkins*, 525 U.S. 234, 240 (1999); *see also Mullane*, 339 U.S. at 314 (noting that "the right to be heard has little reality or worth" where one is unaware, and hence, unable to contest deprivation of his own property interests.) Accordingly, a state must provide a predeprivation process for a controllable deprivation when

that process would be feasible, predictable, and possible. *Zinermon*, 494 U.S. at 136-39.

After the *Parratt-Hudson* doctrine had been established for almost a decade, the lower courts again required clarification for when a predeprivation remedy was required. In *Zinermon*, the Court held that state officials deprived a mental hospital patient of his liberty interests without due process when the patient was legally incompetent to give informed consent for treatment, but was nevertheless committed without any procedural check other than his own "voluntary" consent. *Id.* at 135-39. The proper inquiry to make under the *Parratt-Hudson* doctrine is "whether the state is in a position to provide for predeprivation process." 494 U.S. at 130 (citing *Hudson*, 468 U.S. at 534).

B. A Predeprivation Hearing Was Feasible

Zinermon holds that predeprivation process is feasible, and the *Parratt-Hudson* doctrine cannot apply, when (1) the deprivation at issue is predictable, (2) the predeprivation process is possible, and (3) the deprivation is authorized by the State. *Zinermon*, 494 U.S. at 130, 136-39. It follows that a postdeprivation process does not satisfy due process if the deprivation of a protected interest was not unpredictable or random. *Id.* at 138, n.20 (noting that "state officials cannot escape § 1983 liability simply because the State provides tort remedies").

Pacesetter Apparel was not notified that its property would be destroyed nor was it provided with any predeprivation hearing to defend its property interest. App. 37-38. For that reason, any postdeprivation process in tort cannot suffice as adequate due process if holding a predeprivation hearing was feasible.

C. The Deprivation Was Predictable

A deprivation is predictable when the State can readily identify "a specific, predictable point" that it will occur. *Zinermon*, 494 U.S. at 139. Although the deprivations in *Parratt* and *Hudson* were *foreseeable*,[b] the Court found the deprivations *unpredictable* because there was no way that the respective States could predict when those deprivations would actually occur. *See Parratt*, 451 U.S. at 541; and *Hudson*, 468 U.S. at 533. Conversely, the Court reasoned that the deprivation in *Zinermon* was predictable because a deprivation would occur, if at all, at the specific point when a patient was given admission forms and allowed to consent to treatment. *Zinermon*, 494 U.S. at 139.

Similarly, the deprivation of property that resulted from the order to destroy the property in this

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[b] In *Parratt*, a guard allegedly lost a prisoner's hobby kit, *Parratt*, 451 U.S. at 529; in *Hudson*, a guard allegedly intentionally destroyed a prisoner's personal property, *Hudson*, 468 U.S. at 519-20.

case occurred at "the specific, point" that the destruction order was issued. *Zinermon*, 494 U.S. at 139. The type of deprivation in this case is not only predictable in the sense that it is foreseeable, but also because the specific predictable point at which it will occur will consistently be when the order to destroy is issued. In this case, the Cobb County District Attorney's Office, though informed of Pacesetter Apparel's interest in the clothing, nevertheless ordered the property destroyed without a judicial finding that the property was "contraband."[6] App. 36. The District Attorney's Office knew or should have known the destruction order deprived Pacesetter Apparel of its interest in the property, and that any erroneous deprivation would occur, if at all, with its order to destroy. Therefore, the state actor knew the specific point at which an erroneous deprivation was to occur *and* the type of deprivation was predictable.

D. Predeprivation Process Was Possible

The *Parratt-Hudson* doctrine also does not apply in this case because a predeprivation process was possible. *Zinermon*, 494 U.S. at 136-37. In *Zinermon*, the applicable Florida statutes did not require staff to

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[6] While a *nunc pro tunc* order by the Cobb County Superior Court ordered the property destroyed retroactive to the time when the Cobb County District Attorney's Office actually destroyed the property, it does not relieve the Cobb County District Attorney's Office of its duty to have provided an adequate predeprivation hearing to Pacesetter Apparel.

determine an incoming patient's legal competency to give express consent. *Id.* Despite these statutes, the *Zinermon* Court noted that the Constitution demands officials to implement procedural safeguards to ensure there is no deprivation without due process. *Id.* Unlike *Parratt* and *Hudson*, where the nature of the deprivations made a predeprivation process impossible, in *Zinermon* "there [was] nothing absurd in suggesting that, had the State limited and guided . . . the power to admit patients, the deprivation might have been averted." *Id.* at 137.

Similarly, Georgia has an established procedure for the condemnation of forfeited property. *See* O.C.G.A. § 10-1-454, App. 23-24. The proper procedure requires proof beyond a reasonable doubt that property is contraband before it is destroyed. *Id.* In Georgia, the state's statutory scheme limits and guides the power of those charged with the job of destroying property. *See* O.C.G.A. § 16-13-49, App. 25-28. In this case, the property in question was first destroyed, and then deemed contraband beyond a reasonable doubt by a *nunc pro tunc* order issued nineteen months after the destruction. *See* App. 21, 37-38. Thus, not only was predeprivation process entirely possible, Georgia law required and ensured that process. A statutory scheme that gives state officials "broad power and little guidance" to destroy contraband may not be unconstitutional. *See* 494 U.S. at 135-36. "But when those officials fail to provide constitutionally required procedural safeguards to a person whom they deprive . . . the state officials

cannot then escape liability by invoking *Parratt* and *Hudson*." *Id.*

E. The Deprivation Was Not Unauthorized

Lastly, the *Parratt-Hudson* doctrine should not apply because the property deprivation at issue in this case was authorized by the state. *Zinermon*, 494 U.S. at 138. When a state delegates the power and authority to cause the very deprivation complained of, as well as the "concomitant duty to initiate the procedural safeguards" required under the Constitution, any deprivation of a protected interest cannot be deemed "unauthorized" by the State. *Id.*

Georgia has an established procedure for the condemnation of forfeited property. *See* O.C.G.A. 16-13-49, App. 25-28. The proper procedure to guard against an erroneous deprivation is the requirement of proof beyond a reasonable doubt that property is contraband before it is destroyed. *Id.* In this case, the Cobb County District Attorney's Office exercised its *authority* to destroy forfeited property, but neglected its constitutional *duty* to ensure deprivation was not erroneous.

As previously discussed, the deprivation of Pacesetter Apparel's property interest was predictable and possible. Moreover, because the Cobb County District Attorney's Office's conduct was authorized by the State, predeprivation process was feasible, and the *Parratt-Hudson* doctrine should not control in this case.

There is no reason, other than dereliction of constitutional duty, that the State could not have provided Pacesetter Apparel with a predeprivation process prior the destruction of its property. Consequently, Pacesetter Apparel was denied any meaningful adequate opportunity to be heard regarding its legitimate property interest, and the state officials should not be able to escape liability by merely invoking *Parratt-Hudson*.

F. *Mathews v. Eldridge* Demands a Predeprivation Hearing

The Supreme Court has held that the Constitution generally requires some kind of hearing before a state may deprive a person of a property interest. *See Zinermon*, 494 U.S. 127. To determine the process due, the Constitution requires a balancing test of (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of that interest through the procedures used; and (3) the government's interest in maintaining the procedures used. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

The private interest affected by the official action in this case is substantial. Pacesetter Apparel stood to lose $560,000 from the taking. App. 36. Such a large sum of money has substantial consequences over Pacesetter Apparel's livelihood as a business.

The risk of erroneous deprivation is extremely high in this case because of the lack of any

confirmation that the property in question was in fact contraband before its destruction. App. 37-38. Before the Cobb County District Attorney's Office destroyed the clothing, however, Pacesetter Apparel made the District Attorney's Office aware that counterfeited clothing may have been "seeded" amongst the legitimate clothing. App. 37. Significantly, the District Attorney's Office used a plea bargain from the confessed counterfeiter as the sole reason to label the entire lot of destroyed property as contraband. *Id.*

Lastly, the government's interest is minimal in maintaining the procedures used. Georgia law already provides a procedural check to prevent this sort of deprivation, but neglects to exercise that check in this circumstance. Furthermore, any predeprivation hearing or other process that determined the status of the property in question would be a minimal cost to the state, compared with the high private costs placed upon Pacesetter Apparel for an erroneous deprivation.

It follows that procedural due process required a predeprivation hearing in this case before the property in question was ordered destroyed. Such a hearing would not only have been feasible and practical, but was required by the Constitution as the most effective way to ensure the just protection of legitimate property interests.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari. The Court may also wish to consider summary reversal.

Respectfully submitted,

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June 25, 2010

APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 09-12402

D.C. Docket No. 07-01205-CV-HTW-1

PACESETTER APPAREL, INC.,

Plaintiff-Appellant,

versus

COBB COUNTY GEORGIA,
PATRICK H. H EAD,
Individually and in his official capacity
as District Attorney for Cobb County, Georgia,
ANDREW JASON SALIBA,
Individually and in his official Capacity
as Assistant District Attorney for
Cobb County, Georgia,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(April 1, 2010)

Before TJOFLAT, PRYOR and MARTIN, Circuit Judges.

PER CURIAM:

This appeal presents the question whether the district court erred when it dismissed the complaint of Pacesetter Apparel, Inc. for failure to state a claim of a deprivation of property without due process. Pacesetter had a perfected security interest in property seized under a warrant by Cobb County officials, who later destroyed the property as counterfeit goods, without notice to Pacesetter. Pacesetter filed a complaint against Patrick Head, the District Attorney for Cobb County; Andrew Saliba, an Assistant District Attorney for Cobb County; and Cobb County. We affirm.

I. BACKGROUND

Pacesetter operates a wholesale apparel business in Marietta, Georgia. In October 2001, Pacesetter sold its assets and rights in its name to Vance Bibb and Pacesetter Apparel Group, Inc. As partial payment, Pacesetter Apparel Group executed three promissory notes for $450,000. The promissory notes provided Pacesetter with a security interest in all "accounts . . . , inventory, proceeds, and equipment" of Pacesetter Apparel Group, including any after acquired collateral. Pacesetter perfected its security interest by filing a financing statement with the clerk of the Superior Court of Cobb County, Georgia.

On July 15, 2003, a state magistrate judge issued an order to seize counterfeit inventory from Pacesetter Apparel Group, which officers of the Cobb County Police Department executed on or about July 22, 2003. The police officers seized about 21,400 articles of clothing.

In September 2003, Pacesetter Apparel Group defaulted on its promissory note. In January 2004, Pacesetter initiated a civil action in Gwinnett County State Court to recover the balance owed on the promissory notes. In May 2004, the state county court issued a writ of possession and turnover order demanding that Pacesetter Apparel Group, or any party in possession, surrender its inventory to the Sheriff of Gwinnett County. On August 2, 2004, after it learned that the Cobb County Police possessed the inventory, Pacesetter informed Andrew Jason Saliba, an Assistant District Attorney for Cobb County, of its interest in the seized inventory.

In May 2005, without notice to Pacesetter, Cobb County destroyed the inventory that it had seized as counterfeit goods. On December 2, 2005, the office of the District Attorney for Cobb County informed Pacesetter that the inventory had been destroyed.

Pacesetter filed a complaint in the district court against Cobb County; Patrick Head, the District Attorney for Cobb County; and Andrew Saliba, an Assistant District Attorney for Cobb County. The complaint alleged that the defendants had violated the right of Pacesetter to procedural due process by

destroying its inventory without notice. Cobb County, Head, and Saliba filed motions to dismiss, which the district court granted.

II. STANDARD OF REVIEW

We review an order granting a motion to dismiss *de novo*. *Hoffman-Pugh v. Ramsey*, 312 F.3d 1222, 1225 (11th Cir. 2002). We accept all well-pleaded factual allegations as true and draw all reasonable inferences in favor of the plaintiff. *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S.Ct. 1937, 1949-50 (2009).

III. DISCUSSION

Although the Due Process Clause requires, at minimum, "notice and the opportunity to be heard incident to the deprivation of life, liberty[,] or property at the hands of the government," *Grayden v. Rhodes*, 345 F.3d 1225, 1232 (11th Cir. 2003), the Supreme Court has rejected the notion that a state must always provide a predeprivation hearing. *Hudson v. Palmer*, 468 U.S. 517, 533, 104 S.Ct. 3194, 3203-04 (1984); *Parratt v. Taylor*, 451 U.S. 527, 540-41, 101 S.Ct. 1908, 1915-16 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662 (1986). "[T]he deprivation by state action of a constitutionally protected interest in 'life, liberty, or property' is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law." *Zinermon v. Burch*, 494

U.S. 113, 125, 110 S.Ct. 975, 983 (1990). A "constitutional violation ... is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process." *Id.* at 126, 110 S.Ct. at 983. Under the *Parratt-Hudson* doctrine, when a deprivation of property is random and unauthorized, "[a]ll that due process requires ... is a post-deprivation 'means of redress for property deprivations satisfy[ing] the requirements of procedural due process.'" *McKinney v. Pate,* 20 F.3d 1550, 1563 (11th Cir. 1994) (quoting *Parratt,* 451 U.S. at 537, 101 S.Ct. at 1914). The doctrine extends to both negligent and intentional deprivations by state officials. *Hudson,* 468 U.S. at 533, 104 S.Ct. at 3204.

Georgia law provides an adequate postdeprivation remedy for a wrongful deprivation of property. Georgia law provides a cause of action for conversion of property, Ga. Code Ann. § 51-10-1, which we have held provides an adequate postdeprivation remedy. *Lindsey v. Storey,* 936 F.2d 554, 561 (11th Cir. 1991). Pacesetter argues that this postdeprivation remedy is inadequate because the district attorney enjoys official immunity, but our precedent forecloses this argument. Immunity enjoyed by a state actor or county does not render a state postdeprivation remedy inadequate under the *Parratt-Hudson* doctrine. *Powell v. Georgia Dep't of Human Res.,* 114 F.3d 1074, 1082 n.11 (11th Cir. 1997); *Rittenhouse v. DeKalb County,* 764 F.2d 1451, 1459 (11th Cir. 1985).

IV. CONCLUSION

We AFFIRM the dismissal of the complaint against Cobb County, Head, and Saliba.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

PACESETTER APPAREL, INC.,	:	
Plaintiff,	:	CIVIL ACTION NO.
v.	:	1:07-CV-1205-HTW
COBB COUNTY, et al.,	:	
Defendants.	:	

ORDER

(Filed Apr. 8, 2009)

This matter is now before the Court for consideration of Defendants' motions to dismiss, [Docs. 5, 9], and Plaintiff's motion seeking a ruling on Defendants' motions, [Doc. 22].

I. Factual Allegations of the Complaint

As this case is before the Court on motions to dismiss, the allegations of the Complaint must be accepted as true and construed in the light most favorable to Plaintiff. *See ICA Constr. Corp. v. Reich*, 60 F.3d 1495, 1497 (11th Cir. 1995). Summarizing, those allegations are as follows: Plaintiff, a wholesale apparel business, sold its assets to Pacesetter Apparel Group, Inc., ("Pacesetter Apparel"), an entity owned

by Vance Bibb. Pacesetter Apparel executed a promissory note and security agreement securing the debt, granting to Plaintiff a secured interest in all inventory of Pacesetter Apparel. Plaintiff duly perfected the secured interest by filing a financing statement with the Cobb County Superior Court Clerk.

Two years later, the Cobb County Police Department seized the inventory of Pacesetter Apparel pursuant to an "Order for Search and Seizure," which authorized the seizure based upon the fact that the inventory was comprised of counterfeit items of apparel. Approximately six months after the seizure, Plaintiff filed suit against Pacesetter Apparel to collect on the outstanding unpaid debt under the promissory note. Plaintiff also initiated a foreclosure action against Pacesetter Apparel's inventory. Gwinnett County State Court issued a writ of possession in the foreclosure action.

In a telephone conference with Defendant Jason Saliba, then-counsel for Plaintiff informed Saliba about the perfected security interest and the writ of possession. "Defendant Saliba stated that he suspected Bibb of 'seeding' the goods, where althouth some goods were purchased improperly, others were not." [Doc. 10, Brief at 3]. Approximately one year after that conversation, Cobb County officials destroyed the inventory without any type of forfeiture proceeding and despite the fact that they knew of Plaintiff's secured interest. Further, Defendants did not inform Plaintiff of the destruction of the inventory until six months after the fact.

Bibb ultimately pleaded guilty to forged or counterfeit trademark violations, and in connection with the guilty plea, the Cobb County Superior Court issued a *nunc pro tunc* order "stating 1) all items previously seized and destroyed were counterfeit and therefore, contraband, 2) all contraband should be destroyed, and 3) samples of each item should be kept." [Id. at 4].

In its complaint, Plaintiff raises a single count of deprivation of due process under 42 U.S.C. § 1983, asserting that Defendants "failed to provide adequate notice of the seizure to Plaintiff as mandated by O.C.G.A. § 16-13-49(i)(1)," "provided Plaintiff no advance notice of their intent to destroy said inventory," and "failed to hold a hearing prior to the destruction of said inventory, though such a hearing is required by Georgia law as well as the dictates of due process." [Doc. 1 at 8-9].

II. Discussion

In their motions to dismiss, Defendants assert that Plaintiff has failed to state a claim for relief and that the individual Defendants are protected by absolute and qualified immunity. After careful review of the record in light of the parties assertions, this Court concludes that Plaintiff's claims must be dismissed.

A. Standards for Evaluating a Motion to Dismiss

A district court may dismiss a complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. *Powell v. United States,* 945 F.2d 374, 375 (11th Cir. 1991). In evaluating a motion to dismiss for failure to state a claim, a court must accept as true all allegations contained in the complaint and must view the complaint in the light most favorable to the plaintiff. *See ICA Constr. Corp. v. Reich,* 60 F.3d at 1497. While the Court must weigh every inference in plaintiff's favor, however, "conclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal." *Oxford Asset Mgmt. v. Jaharis,* 297 F.3d 1182, 1188 (11th Cir. 2002). The "threshold of sufficiency that a complaint must meet to survive a motion to dismiss for failure to state a claim is exceedingly low." *Quality Foods de Centro America, S.A. v. Latin America Agribusiness Dev. Corp.,* 711 F.2d 989, 995 (11th Cir. 1983). Thus, a court can dismiss a claim under Federal Rule of Civil Procedure 12(b)(6) only when a plaintiff "can prove no set of facts which would entitle him to relief." *Martinez v. American Airlines, Inc.,* 74 F.3d 247, 248 (11th Cir. 1996).

B. *Rooker/Feldman* Doctrine

At the outset, this Court will accept Plaintiff's argument that, as a technical matter, the clothes could have been altered or "cleansed" in a manner that would permit their resale by, for example, removing the counterfeit tags or, possibly, paying the licensor the proper fees. As such the clothes are not contraband *per se*, and someone could legally possess and sell the clothes.

Nonetheless, as noted by Plaintiff in his response to Defendants' motion, the Cobb County Superior Court issued an order declaring the inventory contraband and that it must be destroyed, and this Court is bound by that legal determination under the Full Faith and Credit Act. 28 U.S.C. § 1738. Although Plaintiff asserts, without elaboration, that the order was improper, [Doc. 10 at 4], Plaintiff has not alleged that a higher state court has reversed or otherwise invalidated that order, and under the *Rooker-Feldman* doctrine, this Court lacks subject matter jurisdiction to review the state court order. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 486, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983) (stating that the *Rooker-Feldman* abstention doctrine establishes that a district court lacks jurisdiction over a litigant's challenge to a state court decision, including challenges alleging the state court's action was unconstitutional); *Dale v. Moore*, 121 F.3d 624, 626 (11th Cir. 1997) ("It is well-settled that a federal district court lacks jurisdiction to review, reverse, or invalidate a final state court

decision."). A holding by this Court that the inventory was not, in fact, contraband or that should not have been destroyed would be akin to an order reversing the state court order. To the degree that, as Plaintiff argues, Cobb County officials failed to follow the proper procedures, Plaintiffs' sole avenue of recourse is in the state appellate system.

C. No Due Process Violation Under *Hudson v. Palmer*

This Court acknowledges that the inventory was destroyed prior to the entry of the state court order, and, if this Court were to accept the argument that because the asserted constitutional violation had already occurred, the court order could not cure the violation, or if for whatever reason the *Rooker-Feldman* doctrine does not here apply, or even if we discount the state court order entirely, this Court still concludes that Plaintiff is not entitled to relief because, in the absence of the court order the destruction of the inventory was unauthorized, and given the postdeprivation remedies available in state court, no due process violation occurred.

Pursuant to O.C.G.A. § 10-1-454(d)(2), "a person who is convicted of or pleads nolo contendere to a felony offense under this Code section [relating to the sale or possession of counterfeit goods] shall forfeit to the State of Georgia such interest as the person may have in . . . [a]ny goods, labels, products, or other property containing or constituting forged or

counterfeit trademarks, service marks, or copyrighted or registered designs. . . ." Additionally, "any property containing a counterfeit trademark, service mark, or copyrighted or registered design shall be destroyed unless the owner of the trademark, service mark, or copyrighted or registered design gives prior written consent to the sale of such property or such trademark, service mark, or copyrighted or registered design is obliterated or removed from such property prior to the disposition thereof." *Id.* § 454(d)(5).

The procedure for the forfeiture of counterfeit goods is that adopted from O.C.G.A. § 16-13-49 relating to the forfeiture of property used in connection with a drug offense. O.C.G.A. § 10-1-454(d)(6). Without quoting § 16-13-49 at length, it is clear from the accepted facts as alleged in the complaint, and as forcefully argued by Plaintiff, that the procedure set forth in the statute was not followed by Cobb County authorities. Accepting Plaintiff's argument that the inventory could have been "cleansed," Plaintiff's property interest should not have been subject to forfeiture under § 16-13-49(e)(1), and Cobb County authorities failed to provide proper notice to Plaintiff under § 16-13-49(i) and failed to institute a proper action under § 16-13-49(o). Accordingly, the seizure and destruction of the property was unauthorized.

According to the Supreme Court, "an unauthorized[1] intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful post-deprivation remedy for the loss is available." *Hudson v. Palmer,* 468 U.S. 517, 533 (1984) (extending the rule first recognized in *Parratt v. Taylor,* 451 U.S. 527 (1981)).[2]

> *Hudson* made clear that as long as some adequate postdeprivation remedy is available, no due process violation has occurred. The state of Georgia has created a civil cause of action for the wrongful conversion of personal property. *See* O.C.G.A. § 51-10-1 (1982). "This statutory provision covers the unauthorized seizure of personal property by police officers. Therefore, the state has provided an adequate postdeprivation remedy when a plaintiff claims that the state has

---

[1] An "unauthorized" seizure by a state actor in this context is a seizure that is carried out in violation of state rules and procedures. An "authorized" seizure is one that is accomplished "pursuant to an affirmatively established or de facto policy, procedure, or custom." *Gillihan v. Shillinger,* 872 F.2d 935, 939 (10th Cir. 1989).

[2] This Court acknowledges that several courts, such as the Tenth Circuit in *Wolfenbarger v. Williams,* 774 F.2d 358 (10th Cir. 1985), have limited the *Hudson* rule to lower-level public employees. However, the Eleventh Circuit has never adopted this limitation, and given the Eleventh Circuit's discussions in *Lindsey* and in *Case v. Eslinger,* 555 F.3d 1317, 1331 (11th Cir. 2009), it is unlikely to do so.

> retained his property without due process of law." *Byrd v. Stewart,* 811 F.2d 554, 555 n.1 (11th Cir. 1987) (citing *Norred v. Dispain,* 119 Ga. App. 29, 166 S.E.2d 38 (1969) (trover action may be brought against police chief for seizure and retention of automobile)).

Lindsey v. Storey, 936 F.2d 554, 561 (11th Cir. 1991).

Because Plaintiff has had access to an adequate postdeprivation remedy in state court, no procedural due process violation has occurred. *Id.*

D. All Defendants Entitled to Judgment

This Court further concludes that the named Defendants, Cobb County, Cobb County District Attorney Patrick Head, and assistant District Attorney Jason Saliba are entitled to judgment in their favor.

In its complaint, Plaintiff does not allege that Defendant Head participated in any way in the seizure or destruction of the inventory. Presumably, then, Plaintiff would assert that Defendant Head is liable under a theory of *respondeat superior.* However, "[i]t is well established in [the Eleventh] Circuit that supervisory officials are not liable under § 1983 for the unconstitutional acts of their subordinates on the basis of *respondeat superior* or vicarious liability." *Hartley v. Parnell,* 193 F.3d 1263, 1269 (11th Cir. 1999) (internal quotation marks and citation omitted). As such, it is clear that Plaintiff has failed to state a claim against Defendant Head.

Likewise, with regard to Cobb County,

> a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.

Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 694 (1978).

As Plaintiff has identified no custom or policy on the part of Cobb County that caused it injury, Cobb County is entitled to dismissal of the claims against it.

Finally, as to Defendant Saliba, he is entitled to qualified immunity.

> The doctrine of qualified immunity provides that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). "Qualified immunity balances two important interests – the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability

> when they perform their duties reasonably." [*Pearson v. Callahan,* 129 S.Ct. 808, 815 (2009)]. "[Q]ualified immunity is a privilege that provides 'an immunity from suit rather than a mere defense to liability.' *Bates v. Harvey,* 518 F.3d 1233, 1242 (11th Cir. 2008) (quoting *Saucier v. Katz,* 533 U.S. 194, 200-01 (2001)). For this reason, the Supreme Court instructs courts to resolve "immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant,* 502 U.S. 224, 227 (1991). To invoke qualified immunity, the official first must establish that he was acting within the scope of his discretionary authority. *Bates,* 518 F.3d at 1242. The burden then shifts to the plaintiff to overcome the defense of qualified immunity. *Id.*

Case v. Eslinger, 555 F.3d 1317, 1325 (11th Cir. 2009); *see also id.* (noting that courts are "no longer bound to follow the 'inflexible' two-part inquiry for qualified immunity that had been required by *Saucier*"). The principles of qualified immunity shield a public official from personal liability when an the official "reasonably believes that his or her conduct complies with the law." *Pearson v. Callahan,* 129 S. Ct. 808, 823 (2009).

Plaintiff's allegations against Defendant Saliba are not entirely clear. For the purpose of this discussion, this Court will assume that he failed to institute proper proceedings regarding the forfeiture

of the inventory and/or that he directed the destruction of the inventory without providing Plaintiff an opportunity to challenge the forfeiture and destruction. This Court finds that the decision to institute a forfeiture proceeding and directing the disposition of chattels that are held for use as evidence in a criminal matter are both clearly within the discretionary authority of a prosecuting attorney, and Plaintiff has failed to demonstrate the violation of a clearly established constitutional right.

As discussed above, this Court has already determined that no due process violation has occurred because of the availability of postdeprivation remedies. *See Case v. Eslinger,* 555 F.3d 1317, 1331 (11th Cir. 2009). Moreover, even if a due process violation occurred, this Court finds that the property right that Plaintiff asserts in the counterfeit goods is not at all clear. Nowhere does Plaintiff argue that the inventory did not bear counterfeit marks, and this Court could not locate a case in which a court held that apparel bearing counterfeit marks was derivative contraband rather than contraband *per se.* Conversely, the federal code, 49 U.S.C. § 80302, defines "any good bearing a counterfeit mark" as contraband and prohibits the transport of such goods. Put simply, this Court is entirely unconvinced that Plaintiff would have been entitled to recover the inventory because it was comprised of counterfeit apparel. Accordingly, Plaintiff cannot overcome Defendant Saliba's assertion of qualified immunity because Plaintiff cannot demonstrate that it was unreasonable for Defendant

Saliba to conclude that Plaintiff was not entitled to possess the counterfeit goods.

III. Conclusion

For the reasons set forth above,

IT IS HEREBY ORDERED that Defendants' motions to dismiss, [Docs. 5, 9], are hereby **GRANTED** and the instant action is hereby **DISMISSED** as to all Defendants.

IT IS FURTHER ORDERED that Plaintiffs motion seeking a ruling on Defendants' motions, [Doc. 22], is **DENIED** as moot.

IT IS SO ORDERED, this 8th day of April, 2009.

s/ *HORACE T. WARD*
HORACE T. WARD
SENIOR UNITED STATES
DISTRICT JUDGE

APPENDIX C

IN THE SUPERIOR COURT OF COBB COUNTY
STATE OF GEORGIA

THE STATE OF GEORGIA	*	INDICTMENT NO.
V.	*	06-9-3945
	*	
ROBERT VANCE BIBB	*	

ORDER

This Court has reviewed the evidence and pleadings in this case and finds beyond a reasonable doubt that Defendant Robert Vance Bibb knowingly purchased and possessed the counterfeit clothing items seized by the Marietta-Cobb-Smyrna Organized Crime Unit on July 23, 2003. The Court further finds Defendant Bibb, nor any other person or business entity, had a lawful possessory or ownership interest in this merchandise as it was contraband from the time of its manufacture as counterfeit clothing, or movement in commerce, or subsequent offer for sell. O.C.G.A. § 10-1-454. "It is well established that when property is subject to forfeiture for violation of the law, title vests absolutely in the government on the date of the illegal act. Seizure and a subsequent decree of forfeiture merely confirms the forfeiture that has already taken place." *United States v. One Parcel of Real Estate Property,* 660 F.Supp. 483, 487 (S.D. Miss. 1987). *See also English et. al. v. State,* 202 Ga.App. 751 (1992). Therefore the State's property interest in the seized contraband is absolute and dates from the date of its manufacture and prior to its

transfer into the inventory of Pacesetter Apparel Group, Inc. Therefore the State lawfully possessed this contraband and could not lawfully return said contraband to Defendant, his business, nor any other entity. This contraband must be destroyed pursuant to O.C.G.A. § 10-1-454(d)(4).

Wherefore it is hereby ordered, based on this Court's finding beyond a reasonable doubt that all of the clothing items seized in this case are counterfeit and therefore contraband, that all such items be forfeited to the State as required by law.

It is further ordered that said contraband be destroyed by the Marietta-Cobb-Smyrna-Organized Crime Unit.

It is further ordered that samples of each type of item shall be kept by the Marietta-Cobb Smyrna Organized Crime Unit for a period of two years from the date of this order.

This order is Nunc Pro Tunc to July 22, 2003.

SO ORDERED this 25 day of January, ~~2006~~ 2007.

/s/ FRANK R. COX
FRANK R. COX
Assiting Superior Court Judge
per O.C.G.A. 15-1-9.1
Cobb Judicial Circuit

Consented to:

/s/ A. JASON SALIBA
A. JASON SALIBA
Assistant District Attorney
Cobb Judicial Circuit

/s/ BRENDAN O'MARRA
BRENDAN O'MARRA
Attorney for
Robert Vance Bibb)

/s/ ROBERT VANCE BIBB
ROBERT VANCE BIBB
Defendant

APPENDIX D

OFFICIAL CODE OF GEORGIA ANNOTATED

TITLE 10. COMMERCE AND TRADE CHAPTER 1. SELLING AND OTHER TRADE PRACTICES ARTICLE 16. TRADEMARKS, SERVICE MARKS, AND TRADE NAMES PART 1. REGISTRATION AND USE OF TRADEMARKS AND SERVICE MARKS

(2010)

§ 10-1-454. Forged or counterfeited trademarks, service marks, or copyrighted or registered designs; unauthorized reproductions

* * *

(d)(1) The State of Georgia finds and declares that the citizens of this state have a right to receive those goods and services which they reasonably believe they are purchasing or for which they contract. The state further finds that the manufacture and sale of counterfeit goods or goods which are not what they purport to be and the offering of services through the use of counterfeit service marks constitutes a fraud on the public and results in economic disruption to the legitimate businesses of this state. In order to protect the citizens and businesses of this state it is necessary to take appropriate actions to remove counterfeit goods from the channels of commerce and prevent the manufacture, sale, and distribution of

such goods or the offering of such services through the use of counterfeit service marks.

* * *

(4) The court shall order forfeiture of property referred to in paragraph (2) of this subsection if the trier of fact determines beyond a reasonable doubt that such property is subject to forfeiture.

(5) The provisions of subsection (u) of Code Section 16-13-49 shall apply for the disposition of any property forfeited under this subsection, provided that any property containing a counterfeit trademark, service mark, or copyrighted or registered design shall be destroyed unless the owner of the trademark, service mark, or copyrighted or registered design gives prior written consent to the sale of such property or such trademark, service mark, or copyrighted or registered design is obliterated or removed from such property prior to the disposition thereof. Any forfeited goods which are hazardous to the health, welfare, or safety of the public shall be destroyed. In any disposition of property under this subsection, a person who has been convicted of or who has entered a plea of nolo contendere to a violation of this Code section shall not be permitted to acquire property forfeited by such person.

(6) The procedure for forfeiture and disposition of forfeited property under this subsection shall be as provided for forfeitures under Code Section 16-13-49.

APPENDIX E

OFFICIAL CODE OF GEORGIA ANNOTATED

TITLE 16. CRIMES AND OFFENSES
CHAPTER 13. CONTROLLED SUBSTANCES
ARTICLE 2. REGULATION OF CONTROLLED SUBSTANCES

(2010)

§ 16-13-49. Forfeitures

* * *

(i)(1) Seizure of property by a law enforcement officer constitutes notice of such seizure to any person who was present at the time of seizure who may assert an interest in the property.

(2) When property is seized pursuant to this article, the district attorney or the sheriff, drug agent, or law enforcement officer seizing the same shall give notice of the seizure to any owner or interest holder who is not present at the time of seizure by personal service, publication, or the mailing of written notice:

(A) If the owner's or interest holder's name and current address are known, by either personal service or mailing a copy of the notice by certified mail or statutory overnight delivery to that address;

(B) If the owner's or interest holder's name and address are required by law to be on record with a government agency to perfect an interest in the property but the owner's or interest holder's current address is not known, by mailing a copy of the notice

by certified mail or statutory overnight delivery, return receipt requested, to any address on the record; or

(C) If the owner's or interest holder's address is not known and is not on record as provided in subparagraph (B) of this paragraph or the owner's or interest holder's interest is not known, by publication in two consecutive issues of a newspaper of general circulation in the county in which the seizure occurs.

(3) Notice of seizure must include a description of the property, the date and place of seizure, the conduct giving rise to forfeiture, and the violation of law alleged.

* * *

(l)(1) If property is seized under this article, the district attorney may:

(A) Remove the property to a place designated by the superior court having jurisdiction over the forfeiture proceeding;

(B) Place the property under constructive seizure by posting notice of pending forfeiture, by giving notice of pending forfeiture to its owners and interest holders, or by filing notice of seizure in any appropriate public record relating to the property;

(C) Remove the property to a storage area, within the jurisdiction of the court, for safekeeping or, if the property is a negotiable instrument or money and is not needed for evidentiary purposes, the

district attorney may authorize its being deposited in an interest-bearing account in a financial institution in this state. Any accrued interest shall follow the principal in any judgment with respect thereto;

(D) Provide for another governmental agency, a receiver appointed by the court pursuant to Chapter 8 of Title 9, an owner, or an interest holder to take custody of the property and remove it to an appropriate location within the county where the property was seized; or

(E) Require the sheriff or chief of police of the political subdivision where the property was seized to take custody of the property and remove it to an appropriate location for disposition in accordance with law.

(2) If any property which has been attached or seized pursuant to this Code section is perishable or is liable to perish, waste, or be greatly reduced in value by keeping or if the expense of keeping the same is excessive or disproportionate to the value thereof, the court, upon motion of the state, a claimant, or the custodian, may order the property or any portion thereof to be sold upon such terms and conditions as may be prescribed by the court; and the proceeds shall be paid into the registry of the court pending final disposition of the action.

* * *

(u)(1) Whenever property is forfeited under this article, any property which is required by law to be

destroyed or which is harmful to the public shall, when no longer needed for evidentiary purposes, be destroyed or forwarded to the Division of Forensic Sciences of the Georgia Bureau of Investigation or any other agency of state or local government for destruction or for any medical or scientific use not prohibited under the laws of the United States or this state.

* * *

(z) This Code section must be liberally construed to effectuate its remedial purposes.

APPENDIX F

OFFICIAL CODE OF GEORGIA ANNOTATED TITLE 50. STATE GOVERNMENT CHAPTER 21. WAIVER OF SOVEREIGN IMMUNITY AS TO ACTIONS EX CONTRACTU; STATE TORT CLAIMS ARTICLE 2. STATE TORT CLAIMS

(2010)

§ 50-21-20. Short title

This article shall be known and may be cited as "The Georgia Tort Claims Act."

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§ 50-21-21. Legislative intent

(a) The General Assembly recognizes the inherently unfair and inequitable results which occur in the strict application of the traditional doctrine of sovereign immunity. On the other hand, the General Assembly recognizes that, while private entrepreneurs voluntarily choose the ambit of their activity and can thereby exert some control over their exposure to liability, state government does not have the same flexibility. In acting for the public good and in responding to public need, state government must provide a broad range of services and perform a broad range of functions throughout the entire state, regardless of how much exposure to liability may be involved. The exposure of the state treasury to tort liability must therefore be limited. State government should not have the duty to do everything that might

be done. Consequently, it is declared to be the public policy of this state that the state shall only be liable in tort actions within the limitations of this article and in accordance with the fair and uniform principles established in this article.

(b) The General Assembly also recognizes that the proper functioning of state government requires that state officers and employees be free to act and to make decisions, in good faith, without fear of thereby exposing themselves to lawsuits and without fear of the loss of their personal assets. Consequently, it is declared to be the public policy of this state that state officers and employees shall not be subject to lawsuit or liability arising from the performance or nonperformance of their official duties or functions.

(c) All of the provisions of this article should be construed with a view to carry out this expression of the intent of the General Assembly.

---

§ 50-21-23. Limited waiver of sovereign immunity

(a) The state waives its sovereign immunity for the torts of state officers and employees while acting within the scope of their official duties or employment and shall be liable for such torts in the same manner as a private individual or entity would be liable under like circumstances; provided, however, that the state's sovereign immunity is waived subject to all exceptions and limitations set forth in this article. The state shall have no liability for losses resulting from

conduct on the part of state officers or employees which was not within the scope of their official duties or employment.

(b) The state waives its sovereign immunity only to the extent and in the manner provided in this article and only with respect to actions brought in the courts of the State of Georgia. The state does not waive any immunity with respect to actions brought in the courts of the United States.

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§ 50-21-24. Exceptions to state liability

The state shall have no liability for losses resulting from:

(1) An act or omission by a state officer or employee exercising due care in the execution of a statute, regulation, rule, or ordinance, whether or not such statute, regulation, rule, or ordinance is valid;

(2) The exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of a state officer or employee, whether or not the discretion involved is abused;

(3) The assessment or collection of any tax or the detention of any goods or merchandise by any law enforcement officer;

(4) Legislative, judicial, quasi-judicial, or prosecutorial action or inaction;

(5) Administrative action or inaction of a legislative, quasi-legislative, judicial, or quasi-judicial nature;

(6) Civil disturbance, riot, insurrection, or rebellion or the failure to provide, or the method of providing, law enforcement, police, or fire protection;

(7) Assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, or interference with contractual rights;

* * *

50-21-25. Immunity of state officers or employees for acts within scope of official duties or employment; officer or employee not named in action against state; settlement or judgment

(a) This article constitutes the exclusive remedy for any tort committed by a state officer or employee. A state officer or employee who commits a tort while acting within the scope of his or her official duties or employment is not subject to lawsuit or liability therefor. However, nothing in this article shall be construed to give a state officer or employee immunity from suit and liability if it is proved that the officer's or employee's conduct was not within the scope of his or her official duties or employment.

(b) A person bringing an action against the state under the provisions of this article must name as a party defendant only the state government entity

for which the state officer or employee was acting and shall not name the state officer or employee individually. In the event that the state officer or employee is individually named for an act or omission for which the state is liable under this article, the state government entity for which the state officer or employee was acting must be substituted as the party defendant.

(c) A settlement or judgment in an action or a settlement of a claim under this article constitutes a complete bar to any further action by the claimant against a state officer or employee or the state by reason of the same occurrence.

APPENDIX G

No. 09-12402-JJ

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PACESETTER APPAREL, INC.,

Plaintiff-Appellant,

v.

COBB COUNTY, GEORGIA,
PATRICK H. HEAD, Individually and in his official Capacity as District Attorney for Cobb County, Georgia, and
ANDREW JASON SALIBA, Individually and in his official capacity as Assistant District Attorney for Cobb County, Georgia.

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF FOR PLAINTIFF-APPELLANT PACESETTER APPAREL, INC.

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STATEMENT OF THE ISSUE ON APPEAL

In a case where a local government and its officials have denied the opportunity to be heard, before and after destruction of property, whether the Plaintiff-Appellant has alleged enough facts to proceed past initial pleadings and on to discovery.

STATEMENT OF THE CASE

This case involves a suit to recover damages for the destruction of property in which Plaintiff-Appellant, Pacesetter Apparel, Inc. had a perfected security interest and a court order granting a writ of possession and turnover order. Pl.'s Reply to Defs.' Mot. to Dismiss at ¶ 3. Defendant-Appellees, Cobb County, et al., destroyed the property in its possession without granting Appellant a hearing before or after said destruction. *Id.* Appellant argues that its Constitutional Due Process rights have been violated by each Appellee.

On November 2, 2001, Pacesetter Apparel, Inc. (hereinafter "Appellant"), a wholesale apparel business, sold its assets to Pacesetter Apparel Group, Inc.,

owned and operated by Vance Bibb, executing a promissory note for $450,000.00. Pl.'s Reply to Defs.' Mot. to Dismiss at ¶ 1. The same day, a security agreement was executed by Pacesetter Apparel Group granting Appellant a security interest in all inventory of Pacesetter Apparel Group then existing or thereafter acquired. *Id.* Appellant's security interest in Pacesetter Apparel Group's inventory was perfected by filing a financing statement with the Clerk of Superior Court of Cobb County, Georgia, in accordance with O.C.G.A. § 11-9-501 *et seq.* on December 19, 2001. *Id.*

Two years later, on July 15, 2003, the Magistrate Court of Cobb County issued an "Order for Search and Seizure" authorizing Cobb County to seize the inventory of Pacesetter Apparel Group. Pl.'s Reply to Defs.' Mot. to Dismiss at ¶ 2. The approximate wholesale value of the seized merchandise was $560,000.00. *Id.* The Order was executed by Cobb County police on July 17, 2003. *Id.* On or about July 22, 2003, the police executed the order, seizing 21,400 articles of clothing inventory (hereinafter "inventory" or "seized property") from Vance Bibb and Pacesetter Apparel Group, Inc. Id. Cobb County alleged that the seized inventory was counterfeit. *Id.*

When Pacesetter Apparel Group defaulted in its obligation to Appellant, Appellant filed a civil lawsuit on or about January 29, 2004, to obtain a judgment for the balance left under the promissory note with Pacesetter Apparel Group, in addition to interest, late charges, and attorney's fees. Pl.'s Reply to Defs.' Mot.

to Dismiss at ¶ 3. Similarly, on April 2, 2004, Appellant filed a personal property foreclosure action seeking to foreclose its perfected security interest in all personal property subject to the perfected security agreement. *Id.* The State Court of Gwinnett County granted Appellant a writ of possession and turnover order for said property in a foreclosure action conducted on May 18, 2004. *Id.* On May 20, 2004, Neil A. Moskowitz, Appellant's counsel at that time, participated in a telephone conversation with Appellee, and Assistant District Attorney for the Cobb Judicial Circuit, Jason Saliba to discuss the seized property. *Id.* At that time, Saliba was informed of Appellant's perfected security interest in the seized property. *Id.* Furthermore, Saliba stated in the conversation that it was his suspicion that Vance Bibb had "seeded" the goods, placing counterfeit goods among other lawfully acquired, and lawfully sold, goods that were not counterfeit. *Id.* Despite this suspicion, the seized property was not inspected to confirm, or deny, the suspicion prior to the destruction of the goods by Appellees. *Id.* Appellee Saliba, acting on behalf of the District Attorney's Office and Cobb County, was again informed on August 2, 2004, of Appellant's security interest in the seized property. *Id.* Approximately ten months later on May 27, 2005, despite actual knowledge of Appellant's security interest in the seized inventory, Appellees transferred the seized property to the Cobb County Waste Transfer Station where it was destroyed without knowledge of the Appellant. *Id.* Appellees provided no notice to the Appellant of their intent to destroy said property and

granted no opportunity for Appellant to be heard regarding his interest in the property. *Id.* In fact, Appellant did not learn about the destruction of the property until six months later when the Cobb County District Attorney's Office finally informed him that the seized property had been destroyed. *Id.* Specifically, Appellant was denied its right to a legally required forfeiture hearing. *Id.*

In December of 2006, over one and a half years after the destruction of the property, Vance Bibb, as President of Pacesetter Apparel Group, was indicted on a charge of forged or counterfeit trademarks. Pl.'s Reply to Defs.' Mot. to Dismiss at ¶ 4. On January 25, 2007, Bibb pled guilty to the charge in a hearing where Appellant was denied standing to voice his concerns and defenses regarding the seized and, subsequently, destroyed property. *Id.* Instead, without granting Appellant the opportunity to be heard, the Superior Court of Cobb County, at Appellees' request, issued a Nunc Pro Tunc order stating 1) all items previously seized and destroyed were counterfeit and therefore, contraband, 2) all contraband should be destroyed, and 3) samples of each item should be kept. *Id.* Without affording Appellant the opportunity to be heard anywhere in the process, this retroactive Nunc Pro Tunc order was an improper endorsement of Appellees' active denial of Appellant's Constitutionally protected Due Process rights. *Id.*

On April 8, 2009, the District Court granted Appellees' motion to dismiss citing Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim

upon which relief could be granted. Order at 12. The District Court supported its conclusion citing the Rooker-Feldman Doctrine, which denies the District Court jurisdiction over state claims that have already been decided by a state court. *Id.* at 5-6. Additionally, the District Court cited *Hudson v. Palmer*, 468 U.S. 517 (1984), as a reason to state that no due process violation had occurred, because it claims that adequate postdeprivation remedies exist under state law. *Id.* at 6-9. Furthermore, the District Court concluded that each Defendants-Appellees were entitled to judgment in his favor. *Id.* at 12.

The District Court cites a variety of different reasons each Defendant-Appellee is entitled to judgment. It asserts that no facts were alleged that would support a claim against District Attorney Patrick Head, except under a theory of Respondeat Superior. *Id.* at 9. With regard to Cobb County, the District Court states that no custom or policy can be identified such that the matter should continue in the courts. *Id.* at 9-10. As for Assistant District Attorney Jason Saliba, the District Court claims that he is protected by qualified immunity for discretionary acts which do "not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 11.

The District Court concluded by saying that even if a Due Process violation had occurred, the property rights of the Appellant were not at all clear. In all, the District Court dismissed the claim against Appellees. *Id.*

STANDARD OF REVIEW

The issue on appeal is whether the District Court erred when it granted Appellees' motion to dismiss. Review of the District Court's order granting the motion to dismiss is subject to de novo review by this Court. *Hill v. White,* 321 F.3d 1334, 1335 (11th Cir. 2003). A motion to dismiss should be granted only if it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim which would entitle it to relief. *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). In evaluating such a motion, the Court must accept the factual allegations in the complaint as true and construe them in the light most favorable to the plaintiff. *Hill,* 321 F.3d at 1335.

SUMMARY OF THE ARGUMENT

The tenets of Due Process found in the Fifth and Fourteenth Amendments of the United States Constitution require that an individual be given notice and a hearing before the state can deprive him of his property. Courts analyze Due Process claims by determining whether the plaintiff had an interest in the property and, if so, by determining what process was due.

In the instant case, the Appellant had an unambiguous security interest in the seized property that was perfected by filing a financing statement. Additionally, Appellant was granted a writ of possession and turnover order for the seized property to satisfy a promissory note with Pacesetter Apparel

Group. Said property interest of an innocent third party is protected from forfeiture under O.C.G.A. § 16-13-49(e)(1)(A),(B). Georgia provides a compliant procedure and process with Constitutional Due Process in O.C.G.A. § 10-1-454 and O.C.G.A. § 16-13-49, acting in conjunction with each other. Georgia's statutes are not in question.

The matter rightfully before this Court is one to determine whether Cobb County has governmental policies or customs that violate Constitutional Due Process. Until the parties proceed through discovery, Appellant and the District Court cannot know the full nature of Cobb County's policies or customs. Additionally, the ability to proceed to discovery will clarify the roles of District Attorney Head and Assistant District Attorney Saliba in their destruction of the seized property. Without discovery, it cannot be determined the extent to which each of these attorneys acted and whether those acts were within the scope of their employment with the County. Furthermore, it can hardly be said that either attorney did not violate a "clearly established statutory or constitutional right."

While the lower court cited the Parratt-Hudson Doctrine as a reason that Due Process was not violated, Appellant argues that the Doctrine does not apply to all Appellees, if any. Postdeprivation remedies are not favored by law, and the Doctrine only applies if the act in question was a random and unauthorized deprivation of property. In so keeping with the Doctrine, the claim should not be dismissed

until the nature of the deprivation of property can be established.

Finally, the lower court cites the Rooker-Feldman Doctrine as a reason to dismiss a state claim that has already reached final judgment in a state court. Appellant, though unhappy with the retroactive Nunc Pro Tunc order issued by the state court, is not appealing the decision of the state court. Appellant's argument focuses on the fact that it had no standing in that case; therefore, it cannot bring an appeal. Additionally, with a denial of standing came a denial to be heard in the state court regarding his interests in the seized and destroyed property. The Rooker-Feldman Doctrine does not apply, because this is a claim about failure to be heard, not a claim about the ultimate decision of the state court.

In all, Appellant simply argues that it should have the opportunity to proceed with this claim in the Federal District Court to achieve an equitable remedy for the abuse of its Constitutional Due Process rights which were violated by Appellees through their policies, customs, or random acts.

ARGUMENT

I. APPELLANT PACESETTER APPAREL, INC.'S CONSTITUTIONAL DUE PROCESS RIGHTS WERE VIOLATED WHEN APPELLEES DENIED APPELLANT NOTICE AND HEARING BEFORE AND AFTER DESTROYING GOODS IN WHICH APPELLANT HAD A PERFECTED SECURITY INTEREST.

Appellant alleges that his Due Process rights, as granted by the United States Constitution, have been violated by Appellees. While the exact extent of the interaction of the parties will not be known until the parties can proceed through discovery, the Appellant has alleged sufficient facts to place this claim before the Federal Courts. "No person shall be deprived of life, liberty, or property, without due process of law." US Const, Amend V. "Nor shall any state deprive any person of life, liberty, or property, without due process of law." US Const., Amend XIV. A Procedural Due Process claim involves a three part test in this Circuit: 1) there has been a deprivation of a constitutionally protected liberty or property interest, 2) the deprivation was caused by state action, and 3) constitutionally inadequate process exists. *Cryder v. Oxendine,* 24 F.3d 175, 177 (11th Cir. 1994). To determine what process is due, or if constitutionally inadequate process exists, the court must determine 1) the interests of the individual in retaining the property and injury cause by the official action, 2) the risk of error in the procedures currently used and the probable value of adding or substituting procedural

safeguards, and 3) the costs and administrative burden of additional process and the interests of governmental efficiency. *Matthews v. Eldridge,* 424 U.S. 319, 321 (1976).

A. Appellant had a perfected security interest in the seized inventory, a writ of possession, and a turnover order; therefore Appellant's property interest in the seized property is clear and unambiguous.

While the District Court states that the Appellant's property rights in the destroyed goods are "not at all clear," Appellant disagrees. Order at 11. A security interest is a property interest created by agreement or by operation of law over assets to secure the performance of an obligation, usually the payment of a debt. *Black's Law Dictionary,* (8th ed. 2004). According to Uniform Commercial Code, Article 9, a security interest is a right in debtor's property that secures payment or the performance of an obligation. UCC §§ 9-101-9-709. "Perfected" means that a security interest has attached to the property, or collateral, and that the secured party has followed all necessary steps or procedures required to protect the secured property against third parties. *Id.*

The facts, as alleged and assumed true, show that Appellant had a perfected security interest in the destroyed property after Appellant filed a financing statement with the Cobb County Superior Court Clerk on December 19, 2001. Pl.'s Reply to Defs.' Mot.

to Dismiss at ¶ 1. On May 18, 2004, the State Court of Gwinnett County granted Appellant a writ of possession and turn over order for the personal property in a foreclosure action. *Id.* at ¶ 3. Rather than being not at all clear, Appellant would state to the contrary – Appellant's property interest is crystal clear. Order at 11.

B. Appellant's Due Process rights were violated when Appellees executed unconstitutional policies or customs, or random and unauthorized acts, to deprive Appellant of proper notice and the opportunity to be heard.

Georgia's Due Process procedures, located in O.C.G.A. § 10-1-454 and O.C.G.A. § 16-13-49 acting in conjunction with each other, define how the government must handle counterfeit goods. O.C.G.A. § 10-1-454(d)(2) is stated as follows:

> "A person who is convicted of or pleads nolo contendre to a felony offense under this Code section [relating to the sale or possession of counterfeit goods] shall forfeit to the State of Georgia such interest as the person may have in . . . [a]ny goods, labels, products, or other property containing or constituting forged or counterfeit trademarks, service marks, or copyrighted or registered designs . . . " O.C.G.A. § 10-1-454(d)(2).

The statute continues by stating:

> "[A]ny property containing a counterfeit trademark, service mark, or copyrighted or registered design shall be destroyed unless the owner of the trademark, service mark, or copyrighted or registered design gives prior written consent to the sale of such property or such trademark, service mark, or copyrighted or registered design is obliterated or removed from such property prior to disposition thereof." Id. § 454(d)(5).

Then, one is directed to another statute for the forfeiture procedure. "The procedure for forfeiture and disposition of forfeited property under this subsection shall be as provided for forfeitures under Code Section 16-13-49." *Id.* § 454(d)(6). The statutory language for the forfeiture procedure, subsequently, provides a defense for innocent third parties:

> "A property interest shall not be subject to forfeiture under this Code section if the owner of such interest or interest holder establishes that the owner or interest holder:
>
> (A) Is not legally accountable for the conduct giving rise to its forfeiture, did not consent to it, and did not know and could not reasonably have known of the conduct or that it was likely to occur;
>
> (B) Had not acquired and did not stand to acquire substantial proceeds from the conduct giving rise to its forfeiture other

than as an interest holder in an arm's length commercial transaction."

O.C.G.A. § 16-13-49(e)(1)(A), (B).

Taking the facts as stated by Appellant, it is apparent that Appellees violated the forfeiture procedure set out by the State of Georgia. Appellant had a perfected security interest in the goods seized by Appellees. Pl.'s Reply to Defs.' Mot. to Dismiss at ¶ 1. Upon seizure, Appellant informed Appellees that it had an ownership interest in the property. Id. at ¶ 3. Later, Gwinnett County State Court issued Appellant a writ of possession and turn over order for the personal property. *Id.*

On May 27, 2005, without giving any notice or a hearing to Appellant, the property in possession of Appellees was destroyed. *Id.* Six months later Appellant learned that the property was destroyed. *Id.* On January 25, 2007, the Superior Court of Cobb County issued a Nunc Pro Tunc order endorsing the destruction without Due Process by stating that all previously seized and destroyed property was contraband, that the contraband should be destroyed, and that samples should be kept. *Id.* at ¶ 4. This order was decided and granted without granting Appellant standing to voice his defenses pursuant to O.C.G.A. § 16-13-49(e)(1)(A) and (B). In fact, the Court denied Appellant standing to voice his defense and concerns. It is clear that the entire process performed by Appellees stands in stark contrast to

the procedures set forth in the Georgia Annotated Code, thus violating the United States Constitution.

1. Appellant alleged sufficient facts to proceed with a claim that Cobb County acted in accordance with a policy or custom that denied Appellant its Due Process rights.

The issue with respect to Cobb County is whether it acted in accordance with a governmental policy or custom when it repeatedly denied Appellant the right to be heard throughout the entire forfeiture process. "[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Monell v. Dep't of Soc. Servs. of City of New York,* 436 U.S. 658, 694 (1978). Appellant has alleged facts that highlight a custom or policy followed by Cobb County that stands in clear violation of Georgia statutes and, more importantly, in clear violation of the United States Constitution. While the exact nature of the policy or custom is not known, Appellant should be granted the ability to proceed through discovery to uncover the pervasiveness of Cobb County's customs and policies such that the Court and each party can become more aware of said policies in an attempt to find a just and equitable remedy for Appellant.

2. Appellant alleged sufficient facts to proceed with a claim that District Attorney Head and Assistant District Attorney Saliba acted outside the scope of their authority, or executed random and unauthorized acts that deprived Appellant of its Due Process.

The ultimate question is whether qualified immunity protects the District Attorneys when they execute acts of non-advocacy. It is clear that Assistant District Attorney Jason Saliba stood in a position of authority to order the destruction of the seized goods. Additionally, while the full nature of District Attorney Patrick Head's interactions with the seized goods is not known, it is reasonable to allege that he signed or issued the ultimate order to destroy the seized goods without granting Appellant notice or a hearing. Generally, there are two types of immunity that shield public officials from 42 U.S.C. § 1983 liability, absolute immunity and qualified immunity. *Neville v. Classic Gardens,* 141 F.Supp.2d 1377, 1381 (S.D. Ga. 2001). Absolute immunity protects the prosecutor's role as an advocate for the State, not his administrative or investigative functions. *Id.* Qualified immunity protects a prosecutor's investigative or administrative acts. *Id. Harlow v. Fitzgerald* states that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). The

official must establish that he was acting within the scope of his discretionary authority to assert qualified immunity. *Bates v. Harvey,* 518 F.3d 1233, 1242 (11th Cir. 2008).

Neither Assistant District Attorney Saliba nor District Attorney Head were acting as advocates for the state, so it is clear that they are not protected by absolute immunity. Multiple questions arise concerning the nature of the District Attorneys' acts to destroy the seized goods. Allowing Appellant to proceed through discovery will help the Court and all parties better understand the "scope" of each District Attorney's discretionary authority and whether these acts were in accordance with a policy or custom of Cobb County, or random and unauthorized deprivations of property. If either, or both attorneys, acted outside of the scope of their employment, they are not protected by any immunity. Moreover, it cannot be said that the attorneys' conduct did not violate a clearly established statutory or constitutional right. Because Saliba and Head are attorneys for the state, it should be assumed that they are fully aware of the state's policies and procedures. Furthermore, the violation of Due Process, failing to afford Appellant notice or a hearing, is a basic tenet of Constitutional Law that is taught multiple times in law school. A reasonable attorney should be familiar with clearly established Constitutional rights like Due Process, especially when executing one's duties for the state.

Discovery should enlighten everyone to the scope of both District Attorneys' employment and the

nature of each attorney's acts, random or not. Doing so will further define the liability of each attorney regarding his part in the destruction of Appellant's clear and unambiguous property interest.

C. The Parratt-Hudson Doctrine does not apply unless it is found that a random and unauthorized deprivation of property occurred, which is a question of fact yet to be resolved.

Opportunity to be heard is required by Due Process and must be given before the deprivation of a property interest except in extraordinary situations where some valid governmental interest is at stake which justifies postponing the hearing until after the event. *Burnley v. Thompson,* 524 F.2d 1233, 1241 (Ga.App. 1975), quoting *Boddie v. Connecticut,* 401 U.S. 371, 379 (1971). Postdeprivation remedies are never favored and are constitutionally inadequate. *King v. State,* 535 S.E.2d 492, 496 (Ga. 2000). Postdeprivation remedies do not provide due process if predeprivation remedies are practicable. *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 436 (1982), *Bendiburg v. Dempsey,* 909 F.2d 463, 470 (11th Cir. 1990). Under the Parratt-Hudson Doctrine, a random and unauthorized deprivation of property does not violate procedural due process if the state provides an adequate postdeprivation remedy. *Parratt v. Taylor,* 451 U.S. 527, 541 (1981). Without knowing the exact nature of the acts which denied Appellant its Due

Process, the Court cannot know whether the Parratt-Hudson Doctrine applies. The lower court cited the Parratt-Hudson Doctrine as a reason to dismiss claims against Appellees, but Appellant argues that the Doctrine is not one that reaches to all Appellees, if any.

A question of fact remains whether the acts of the District Attorneys Head and Saliba were random and unauthorized or whether the acts were in accordance with a governmental policy or custom that denied Appellant procedural due process. If the acts were random and unauthorized, the Parratt-Hudson Doctrine might apply. Appellant needs to proceed through discovery to better understand the actual roles of the District Attorneys in denying Appellant its rights. If these were not random acts, the Parratt-Hudson Doctrine will not protect Cobb County. It can be disseminated from the facts that Appellees were holding the seized goods without extraordinary circumstances requiring their destruction. It would not have been impracticable to hold a predeprivation hearing in consideration of the fact Appellees found a way to conduct a judicial hearing determining the nature and fate of the goods at a later date. In other words, a predeprivation hearing was quite practicable. Additionally, at that judicial hearing, Appellees refused to give Appellant standing. Not only did Appellant have no access to a predeprivation hearing, but Appellant was also denied a post-deprivation hearing. Furthermore, it should be noted that O.C.G.A. § 50-20-21(7) exempts the state from

claims arising from, among other torts, abuse of process, interference with contractual rights, and intentional torts. Ultimately, the question of the Appellees' roles in this claim must be determined through discovery to understand the nature of their liability. The lack of any predeprivation hearing before the destruction of the seized property is cause for grave concern and a clear violation of Due Process.

II. APPELLANT WAS DENIED STANDING IN THE STATE COURT, THEREFORE IT HAD NO HEARING OR RIGHT OF APPEAL; SO THE ROOKER-FELDMAN DOCTRINE DOES NOT APPLY.

The Rooker-Feldman Doctrine requires that 1) the action in Federal Court is brought by a state court loser, 2) the injury alleged is caused by the state court judgment, 3) the state court judgment was rendered before the district court proceedings, and 4) the case must invite district court review and rejection of the state court judgment. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983). Since the Rooker-Feldman Doctrine was established, the Federal Courts, rather than taking a broad approach to the Doctrine, have continually narrowed its scope. Allison B. Jones, *The Rooker-Feldman Doctrine: What Does It Mean To Be Inextricably Intertwined?* 56 Duke L.J. 643, 658 (2006). The Court's current approach can be articulated as applying to "cases brought by state-court losers

complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 364 F.3d 102, 106 (3d Cir. 2004).

In this case, the Rooker-Feldman Doctrine does not apply. It is true that a state court decision was rendered, but it is not the decision of the state court that is in question. Instead, it is the denial of the Appellant's Constitutional Due Process that is before the Federal Court. When one applies Appellant's facts to the elements of the Rooker-Feldman Doctrine, above, it is clear that the lower court errantly dismissed Appellant's Due Process claim on the grounds that Appellant failed to state a proper claim.

The first requirement of the Rooker-Feldman Doctrine is that the Appellant be a loser in state court. In the instant case, Appellant was never a party to the criminal action that issued the Nunc Pro Tunc order "rubber stamping" the destruction of the "counterfeit clothing" after that clothing was already destroyed. The state court denied Appellant standing, despite issuing a ruling on the property with actual knowledge of Appellant's perfected security interest.

The second prong of this Doctrine requires that the injury alleged is caused by the state court judgment. Though the Appellant disagrees strongly with the state court's judgment, this is a Due Process claim, not a claim asking the Federal Court to

reconsider the state court's decision. Appellant brings this claim simply because the state court and state officials refused to give Appellant the opportunity to be heard. Appellant simply wanted to assert its rights afforded under Georgia statutes.

The state court judgment was rendered before the District Court judgment, so the third prong does not require any further discussion; but the fourth prong is of utmost importance. This prong requires that the Appellant ask the Federal Court to review and reject the state court judgment. The Appellant does not ask the Federal Court to review the state court judgment. The Appellant asks this court to provide an equitable remedy for the violation of his Constitutional right to a hearing before his property was taken and destroyed. The state court's decision would have been acceptable if Appellant was able to levy his concerns in front of the court. He was not allowed to voice his opinions, concerns, and interests before the state court, however. Instead, the state court rendered its decision without hearing or considering the rights of the Appellant as an innocent third party protected by O.C.G.A. § 16-13-49(e)(1)(A), (B).

Addressing the ruling of the District Court, it is important to note that the lower court focused solely on the decision of the state court to destroy the contraband, stating that "this Court is bound by that legal determination under the Full Faith and Credit Act." Order at ¶ 9. The lower court misconstrued the entire thrust of Appellant's argument. Appellant

argues that it did not get a hearing; therefore, its Constitutional rights were violated when the state court rendered its decision to destroy the property. Ultimately, the Rooker-Feldman Doctrine has no place in this claim brought before the Eleventh Circuit Federal Courts.

CONCLUSION

For the foregoing reasons, this Honorable Court should reverse the decision of the District Court and remand the case for further proceedings.